

EVADING EU LAW THROUGH SUMMARY RETURNS AT INTERNAL BORDERS: PRACTICE, LEGALITY AND THE ROLE OF COURTS

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Abstract

This article examines the evasion of EU law through summary returns at internal EU borders. It provides a mapping of Member States' practices and assesses their legality under the current and reformed EU asylum, border, and return laws. It shows how Member States increasingly rely on unilateral and bilateral mechanisms, including refusals of entry and readmission agreements, to circumvent common procedures. Drawing on a comprehensive review of case law, the article offers a comparative analysis of the response of domestic courts, concluding that judicial oversight has been vital but insufficient. The article proposes, inter alia, targeted legislative amendments to prevent the normalization of removal practices that undermine the effect utile of EU law, legal coherence, and fundamental rights accountability.

1. Introduction

As this journal's editors have noted, EU law is pressured by a collective sense of fear and the perception of ongoing crises, allowing for an over-emphasis on security as a solution to social issues.¹ Migration, portrayed as a risk to the stability and cohesion of Europe, is a prominent example of this

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1. 'Editorial Comments: The Passion for Security in European Societies' (2024) 61(2) CML Rev 283, 284, doi: 10.54648/COLA2024022.

dynamic.² While the ‘securitization’ or ‘crisification’ of migration law, discourse, and practice is a long-standing phenomenon, it seems to be gaining increasing momentum. Note, for example, how the Commission justifies exceptions to the principle of *non-refoulement* – a cornerstone of international law that does not allow derogations and applies even in times of emergency – with dramatic changes in the Union’s security environment,³ or governments’ use of individual criminal acts to promote systematic rejections of asylum seekers at borders⁴ coupled with the disregard of court decisions that establish the primacy of EU law.⁵

This situation has fostered an environment of derogations amidst a growing tension between the Europeanization and re-nationalization of asylum and migration processes. On the one hand, EU asylum and immigration law increasingly permits deviations from established standards and procedures, risking the normalization of practices that can challenge key legal principles.⁶ On the other hand, Member States are pushing even beyond these formal derogation mechanisms, thus questioning the boundaries of the common EU legal framework.⁷

Legal scholars have widely researched the trend of circumventing the application of EU law at external borders through creative means,⁸ emphasizing the rule of law crisis and the accountability gap accompanying it.⁹

2. Valeria Bello, ‘The Spiralling of the Securitisation of Migration in the EU: From the Management of a “Crisis” to a Governance of Human Mobility?’ (2022) 48(6) *Journal of Ethnic and Migration Studies* 1327, doi: 10.1080/1369183X.2020.1851464.

3. European Commission, ‘Communication on countering hybrid threats from the weaponisation of migration and strengthening security at the EU’s external borders’ (2024) 570 final, 6.

4. Deutscher Bundestag, ‘Entschließungsantrag der Fraktion der CDU/CSU zu der Abgabe einer Regierungserklärung durch den Bundeskanzler zu aktuellen innenpolitischen Themen’, 20/14698.

5. ‘Dobrindt muss Begründung schnell nachliefern’ (*Legal Tribune Online*, 13 June 2025) <www.lto.de/recht/nachrichten/n/hubig-zurueckweisungen-dobringt-muss-begrueendung-schnell-nachliefern> (all websites last accessed 20 January 2026).

6. In particular, the principles of effectiveness of EU law and loyal cooperation, as well as the principle of *non-refoulement*. See Violeta Moreno-Lax, ‘The “Crisification” of Migration Law: Insights from the EU External’ in Stella E Burch, Kevin Cope and Jill I Goldenziel (eds), *Oxford Handbook of Comparative Immigration Law* (OUP 2023).

7. Editorial Comments (n 1) 293–294.

8. Thomas Gammeltoft-Hansen, ‘Creative Legal Thinking and the Evolution of International Refugee Law’ (2014) 112(1) *Lakimies* 99.

9. Among many, see Cathryn Costello and Itamar Mann, ‘Border Justice: Migration and Accountability for Human Rights Violations’ (2020) 21(3) *GLJ* 311, doi: 10.1017/glj.2020.27; Adel-Naim Reyhani, ‘Anomaly upon Anomaly: The 1951 Convention and State Disintegration’ (2021) 33(2) *International Journal of Refugee Law* 277, doi: 10.1093/ijrl/eeab042; Anusheh Farahat, ‘Human Rights and the Political: Assessing the Allegation of Human Rights Overreach in Migration Matters’ (2022) 40(2) *Netherlands Quarterly of Human Rights* 180, doi: 10.1177/09240519221092631; Luisa Marin, Mariana Gkliati and

This article complements this literature by analysing how States apply similar strategies at internal borders, thereby prioritizing the unilateral and bilateral over the supranational *modus operandi*.¹⁰ Indeed, in intra-EU mobility, the increasing perception of migration as a threat has created a significant dilemma. While policies ostensibly aim to facilitate the free movement of citizens, they simultaneously seek to achieve a competing second goal: restricting secondary movements of asylum seekers and irregular migration.¹¹ As this article describes, the prioritization of the latter has created a palpable tension with the former and also significant legal ambiguity, widespread procedural irregularities, and serious fundamental rights concerns.¹²

Courts assume great significance in such a landscape of EU law evasion. While the role of the Court of Justice of the EU (CJEU) has been crucial, the limitations of the EU's system of indirect remedies against violations of fundamental rights have brought national courts to the fore.¹³ Scholarship presents diverging normative views on the desirability of their autonomy: as a risk to the uniformity of the EU's common legal order due to diverging domestic laws, procedures, and traditions;¹⁴ or as a fulfilment of a potentially constructive complementary function, particularly given the crisis of the rule of law.¹⁵ However, research assessing the role of courts *vis-à-vis* Member State practice at intra-EU borders, including from a socio-legal

Salvatore F Nicolosi, 'Guest Editorial: The External Borders of the European Union: Between a Rule of Law Crisis and Accountability Gaps' (2024) 30(1–2) ELJ 2, doi: 10.1111/eulj.12518.

10. In a similar direction, see also Emanuela Pistoia, 'Rule of Law Backsliding within the EU: The Case of Informal Readmissions of Third-Country Nationals at Internal Borders' (2024) 30(1–2) ELJ 60, doi: 10.1111/eulj.12515; Iker Barbero, 'The European Union Never Got Rid of Its Internal Controls' (2018) 20(1) European Journal of Migration and Law 1, doi: 10.1163/15718166-12340018.

11. For the most recent example of this emphasis, see Art 9 of the Commission's 2025 proposal for a Return Regulation.

12. See also Daniel Thym, 'Reinvigorating Schengen amid Legal Changes and Secondary Movements' (2024) <www.epc.eu/content/Schengen_DPEMD1.pdf>; Stefan Salomon and Jorrit Rijpma, 'A Europe without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship' (2023) 24(2) GLJ 281, doi: 10.1017/glj.2021.60.

13. Andreas Hofmann, 'The Role of National Courts in Redressing Fundamental Rights Violations by the EU' in Melanie Fink (ed), *Redressing Fundamental Rights Violations by the EU: The Promise of the 'Complete System of Remedies'* (CUP 2024). Consider also recent case law from the Court of Justice that arguably reinforces the role of domestic courts in asylum matters: Joined Cases C-758 & C-759/24, *LC, CP v Commissione territoriale per il riconoscimento della protezione internazionale di Roma – sezione procedure alla frontiera II*, EU:C:2025:591.

14. Melanie Fink, 'Conclusion' in Fink (ed) (n 13).

15. Hofmann (n 13) 156.

perspective, has been limited, focusing on single jurisdictions,¹⁶ the CJEU's case law,¹⁷ or the issue of reintroducing internal border controls.¹⁸

The article closes this research gap by engaging with the phenomenon of 'summary returns at internal borders'¹⁹ – that is, the forced, informal, and expedient removals of asylum seekers and others without individualized risk assessments. After mapping this practice in selected Member States, it analyses their legality under the current framework (the Dublin Regulation,²⁰ the Return Directive,²¹ and the Schengen Borders Code²²) and the reformed Common European Asylum System (CEAS) laws. Finally, it conducts a broad comparative analysis of domestic judicial interventions, assessing the extent to which courts have played a constructive role in upholding the primacy of EU law and securing accountability.

Given the article's focus on the role of courts, the selection of countries for closer analysis was guided by the availability of national case law. From a review of over 1,500 judicial decisions,²³ 44 were identified as relevant, stemming from courts in Austria, France, Germany, Italy, and Slovenia. For these countries, the article examines patterns of judicial engagement with the development of State practice. In addition to doctrinal legal analysis and a review of academic literature and case law, the research draws on reports by civil society organizations and national human rights institutions, interviews, as well as the (informal) input of experts with first-hand insights into relevant debates and practices at both EU and Member State levels.

16. Barbero (n 10).

17. Pistoia (n 10); Stefano Montaldo, Verus Kelch and Simone Poncini, 'The Past and the Future of Readmissions in the EU: From the AFFUM, ARIB and ADDE Case Law to the Reform of the Schengen Borders Code' (2024) *Freedom, Security & Justice: European Legal Studies* 188.

18. Stefan Salomon, 'What Happens after the Court of Justice Has Given its Ruling? Promises and Pitfalls of Strategic Litigation against Internal Border Controls in EU Law' (2024) 25(6) *GLJ* 1043, doi: 10.1017/glj.2024.57.

19. Note that this article disregards the legality of reinstating internal border controls. Furthermore, it does not engage with the context of air borders.

20. Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L 180.

21. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348.

22. Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L 77.

23. Rulings from the EUAA's case law database, AIDA country reports, domestic databases, and individual decisions from country experts were screened to identify relevant case law.

The article's structure initially follows the division established in EU law between the return of asylum seekers and that of other third-country nationals. For each category, it analyses the practice of Member States in light of the EU legal framework as interpreted by the evolving case law of the CJEU. Section 2 examines two distinct forms of evasion of the EU's asylum rules: the disregard of protection claims; and the use of expedited 'pre-Dublin' transfers. Establishing the clarity with which EU law obliges Member States to follow common procedures, the section also analyses the possibility of derogations based on Article 72 TFEU.²⁴ Section 3 addresses the legality of practices that bypass the procedure envisaged in the Return Directive: refusals of entry under the Schengen Borders Code and the use of bilateral readmission agreements to return irregularly staying third-country nationals. It also assesses the potential and challenges associated with the newly introduced derogation of the intra-EU transfer procedure and the 2025 European Commission proposal for a Return Regulation.²⁵ The role of domestic judicial interventions in addressing rights violations at internal EU borders amidst the challenges posed by a multi-layered legal framework and intricate practical circumstances is evaluated in Section 4.

The article concludes that the persistent evasion of common procedures through summary returns at internal borders is concerning. While the CJEU has provided clarity and domestic courts have been constructive in challenging Member State practices, the EU legislators codified controversial national approaches. Several lines of action are proposed to ensure the *effet utile* of EU law, legal coherence, and accountability for violations of individual rights: strengthening domestic courts and their cooperation with civil society actors, increasing CJEU oversight, and remedying the Return Directive's derogation option for readmission agreements.

2. Disapplying asylum rules

Among those crossing the internal borders of the Member States are applicants for international protection. For them, until June 2026, the Dublin Regulation constitutes the primary legal framework for administering and implementing transfers between Member States. Its main purpose is to

24. Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326.

25. Proposal for a Regulation of the European Parliament and of the Council establishing a common system for the return of third-country nationals staying illegally in the Union, and repealing Directive 2008/115/EC of the European Parliament and the Council, Council Directive 2001/40/EC and Council Decision 2004/191/EC COM/2025/101 final.

establish clear criteria and procedures to determine which single Member State is responsible for examining an asylum application. Alongside the Asylum Procedures Directive,²⁶ it requires States to assess protection claims made at the borders and follow common procedures and safeguards before removing individuals to the State deemed responsible for processing the case in substance.

However, Member States have evaded Dublin rules through summary returns at intra-EU borders that follow two distinct modalities: (1) in most cases, individuals are immediately returned following the outright disregard of asylum claims and the denial of access to procedures; (2) under a more sophisticated but rare approach, rules for Dublin transfers are bilaterally circumvented after individuals are identified as protection seekers. This section maps these practices, analyses respective EU legal standards, and anticipates the impact of the new CEAS, as reformed in 2024. Given the clarity of core principles governing asylum claims at internal borders, it finally addresses the prospect of legitimizing derogations based on the ‘maintenance of law and order and the safeguarding of internal security’ referred to in Article 72 TFEU.

2.1. *Disregarding applications for international protection*

Member States have limited access to asylum procedures by instances of ignoring, appearing to ‘overhear’, or misinterpreting applications, resulting in the immediate return of applicants, typically during attempts to cross internal land borders. Before engaging with relevant EU law, we identify the main characteristics of Member States’ approaches as embedded in domestic law and bilateral arrangements and highlight commonalities and context-specific features.

Assessing the extent of immediate or direct summary returns against asylum seekers at internal borders is virtually impossible, given that those affected regularly lack adequate legal protection, which leaves many cases unreported. Despite this, available sources indicate that the phenomenon is a relevant concern, warranting a thorough review of EU law. In Austria, for example, until judicial interventions, systematic pushbacks against asylum seekers towards Slovenia have been noted by courts.²⁷ France

26. Directive (EU) 2013/32 of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180.

27. As determined, eg in Landesverwaltungsgericht Steiermark, 20.3-2725/2020-86, 1 July 2021. See also Border Violence Monitoring Network, ‘Input to the EUAA Asylum Report 2024’ <euaa.europa.eu/sites/default/files/2024-02/border_violence_monitoring_network.pdf>.

appears to be showing a continuous and widespread disregard for asylum applications at its internal Schengen borders. For instance, at the border with Italy, ‘serious and massive violations of the rights of asylum seekers’ have been reported.²⁸ In Germany, while the country had already allegedly pushed back individuals towards Austria in the past, until a policy change in 2025, there was no evidence for summary returns against asylum seekers.²⁹ However, it had been noted that registered asylum applications had plummeted while entry refusal rates had significantly increased,³⁰ and that there were irregularities in the police assessments of whether asylum was claimed, thus indicating a potential obstruction of access to procedures.³¹ In May 2025, German police were explicitly instructed to refuse entry to asylum seekers.³² According to reports and case law, Italy also summarily returned asylum seekers to other Member States – on land towards Slovenia,³³ but similarly at Adriatic ports, where individuals, including minors, have been forcibly returned to Greece on vessels.³⁴ Slovenian authorities have reportedly employed informal return practices

Note that, since March 2023, Austria and Slovenia have again established closer collaboration in the form of enhanced mixed patrols and joint targeted police activities (European Commission, ‘Annex 3 to the State of Schengen Report’, COM(2024)173 final, 4).

28. Defender of Rights, ‘Respecter les droits des personnes migrantes à la frontière intérieure franco-italienne: Décision-cadre du Défenseur des droits n° 024-061 portant recommandations en application de l’article 25 de la loi n° 2011-333 du 29 mars 2011’ (2024) 72.

29. Note that summary returns have been carried out based on the arrangement described under Section 2.2.

30. Including against individuals from countries with high recognition rates.

31. Pushback Alarm Austria, Border Violence Monitoring Network and Bayerischer Flüchtlingsrat, *NGOs Sound the Alarm: Evidence of Systematic Pushbacks Now Also at the German-Austrian Border* (2023); Die Linke, ‘Kleine Anfrage: Zurückweisungen an den deutschen Binnengrenzen im zweiten Halbjahr 2024’ (Drucksache 20/14387, 2024) <dserver.bundestag.de/btd/20/143/2014387.pdf>; Bundesregierung Deutschland, ‘Antwort der Bundesregierung auf die Kleine Anfrage – Drucksache 20/14387: Zurückweisungen an den deutschen Binnengrenzen im zweiten Halbjahr 2024’ <dserver.bundestag.de/btd/20/149/2014902.pdf>.

32. Exceptions shall apply to certain individuals deemed to belong to vulnerable groups. See Legal Tribute Online (n 5).

33. AIDA, ‘Country Report Italy’ (2025) <asylumineurope.org/reports/country/italy/>; Salomè Archain and Olga Cardini, ‘L’ineffettività del diritto d’asilo alla frontiera. Fra prassi informali e diritti negati’ (2021) 5 *Lakes Reservoirs Res Manage* 6 <flore.unifi.it/handle/2158/1346533>. See also Tribunale Ordinario di Roma, 56420/2020, 18 January 2021; 7045/2021, 27 April 2021; 3938/2022, 9 May 2023.

34. Lighthouse Reports, ‘Detained below Deck’ (2023) <www.lighthousereports.com/investigation/detained-below-deck/>. See also Tribunale Ordinario di Roma, 21667/2023, 7 July 2023, and the facts underlying *H.T. v Germany and Greece* App no 13337/19 (ECtHR, 15 October 2024).

against asylum seekers at their border with Croatia.³⁵ Primarily due to Croatia's refusal to accept returns,³⁶ readmissions have recently decreased significantly.³⁷

Domestic frameworks include provisions capable of both facilitating and hindering such practices. Austrian law prevents pushbacks by prohibiting deportation before a final asylum decision or procedure termination.³⁸ Similarly, Slovenia's asylum law protects individuals from deportation once they express asylum intent.³⁹ Italian law also stands against pushbacks, including constitutional asylum rights that imply access to territory and judicial appeal requirements for formal administrative acts related to forced returns.⁴⁰ French and German law are more ambiguous. France has introduced a specific asylum regime for external borders, which authorities have partly applied at internal borders.⁴¹ The law also includes a 'fiction of non-entry' in connection with an admission procedure, thus treating asylum applicants in 'waiting zones' as not having legally entered the country.⁴² German law permits summary returns of asylum seekers at borders in specific circumstances,⁴³ also employing the 'fiction of non-entry' concept.⁴⁴

35. Human Rights Ombudsman of the Republic of Slovenia, 'National Report on the Situation of Human Rights of Migrants at the Borders' (2021); Veronika Bajt, 'Slovenia: Pushbacks of Unwanted Migration', *Border Criminologies from the Periphery* (Routledge 2025). See also, for example, Upravno sodišče Republike Slovenije, I U 1412/2019, 18 December 2019; I U 1686/2020, 7 December 2020.

36. According to COM(2024)173 final (n 27) 21, Croatia did not accept 'any of the 2,628 requests for readmission under the informal procedure, since Croatia does not readmit people that have already lodged a request for international protection in Slovenia'.

37. AIDA, 'Country Report Slovenia' (2025) <asylumineurope.org/reports/country/slovenia>; European Center for Constitutional and Human Rights, 'Slovenia's Paper Pushbacks: Hasty Readmissions to Croatia Denying Critical Procedural Safeguards' (2023) <www.ecchr.eu/fileadmin/user_upload/Slovenia_factsheet_April_2023.pdf>.

38. Art 12 of the Austrian Asylum Act (Asylgesetz 2005). Before the conclusion of the admission procedure, however, which includes a basic screening, the asylum seeker is considered not to have a right to stay.

39. Art 36(1) of the Slovenian International Protection Act.

40. Art 10(3) of the Italian Constitution; see also Tribunale Ordinario di Roma, 56420/2020, 18 January 2021.

41. Contrary to the *Conseil d'État* and the CJEU's interpretation, which requires that Book V of the French Code of entry and residence of foreigners and the right to asylum (Code de l'entrée et du séjour des étrangers et du droit d'asile, CESEDA) applies, demanding provision of accommodation, application registration, and processing by asylum authorities according to Art L552-12.

42. Arts L340-1 to L343-11 of CESEDA. See also *Conseil d'État*, *Juge des référés*, 411575, 5 July 2017.

43. When Germany is not responsible for their claim, and they enter from a safe third country, or when they pose public safety risks due to serious criminal convictions, according to Art 18(2) of the German Asylum Act (Asylgesetz).

44. Art 13(2) sentence 1 of the German Residence Act (Aufenthaltsgesetz).

Authorities in various countries, particularly in France, Italy, and Slovenia, have drawn on readmission agreements, as analysed below (Section 3.2), to execute and legitimize direct summary returns.⁴⁵ However, the content of these agreements varies in terms of their applicability to asylum seekers. Austria-Slovenia⁴⁶ and France-Italy⁴⁷ agreements explicitly preserve asylum rights or exclude asylum seekers, while Germany's agreement with Austria exempts cases under the country's responsibility.⁴⁸ Italian agreements with Greece⁴⁹ and Slovenia,⁵⁰ as well as the Slovenia-Croatia agreement, contain no explicit exclusion of asylum seekers.⁵¹ Despite this, Italy's agreements have been interpreted as not applicable to asylum seekers.⁵²

Authorities frequently seek to justify their actions based on factual assertions, typically arguing that asylum was not claimed and thus implicitly acknowledging the illegality of pushing back asylum seekers.⁵³ In France, authorities also argue, for example, that the facilities at borders cannot accommodate applications, that individuals have not yet legally entered the country, that Italy is safe, and that the Dublin Regulation would justify immediate removal to Italy as the first country of entry.⁵⁴ While the German Government had first sought to defend the legality of refusals of entry against asylum seekers who had lodged applications also in other Member

45. In Austria, authorities regularly used refusals of entry according to Art 14 of the Schengen Borders Code, while the relevance of the readmission agreement with Slovenia remained unclear. In Slovenia, the readmission agreement with Croatia was widely used.

46. Art 6 of the Austria-Slovenia readmission agreement (Abkommen zwischen der Regierung der Republik Österreich und der Regierung der Republik Slowenien über die Übernahme von Personen an der gemeinsamen Grenze).

47. Art 6 of the France-Italy (Chambéry) agreement (Accord entre le Gouvernement de la République française et le Gouvernement de la République italienne relatif à la réadmission des personnes en situation irrégulière, signé à Chambéry le 3 octobre 1997).

48. Art 2(3)d of the Austria-Germany readmission agreement (Abkommen zwischen der Bundesregierung der Republik Österreich und der Regierung der Bundesrepublik Deutschland über die Rückübernahme von Personen an der Grenze).

49. Italy-Greece readmission agreement (Accordo tra Italia e Grecia sulla riammissione delle persone in situazione irregolare).

50. Italy-Slovenia readmission agreement (Accordo tra il governo della repubblica di Slovenia e il governo della repubblica Italiana sulla riammissione delle persone alla frontiera).

51. Slovenia-Croatia readmission agreement (Sporazum med vlado republike slovenije in vlado republike hrvaške o izročitvi in sprejemu oseb, katerih vstop ali prebivanje je nezakonito).

52. Tribunale Ordinario di Roma, 21667/2023, 7 July 2023, and 56420/2020, 18 January 2021.

53. See eg the justifications provided by authorities in the Austrian case law cited in Section 4.

54. Defender of Rights (n 28) 72–96.

States, including based on the ‘fiction of non-entry’, it changed its position in 2023,⁵⁵ leading to a discussion on derogating from secondary EU law based on Article 72 TFEU.⁵⁶ Justification attempts for the explicit pushback policy against asylum seekers introduced in 2025 include the alleged failure of the Dublin system and hybrid threats to national security.⁵⁷ Italian authorities have argued, *inter alia*, that the application of readmission agreements would imply legality.⁵⁸ In Slovenia, authorities have claimed that Croatia is generally a safe country, given its status as a Member State and the adaptation of its legal system to EU standards, thus dismissing claims of *non-refoulement* violations.⁵⁹

However, these justifications lack sufficient grounding in EU law. Indeed, the Asylum Procedures Directive, which also applies to Dublin cases, guarantees those making asylum claims effective, easy, and rapid access to procedures, irrespective of legal status, as the CJEU has repeatedly noted.⁶⁰ For example, in a case concerning intra-EU readmission from Poland to Lithuania, the Court interpreted Articles 6 and 7(1) of the Directive based on the right to asylum in Article 18 of the EU Charter of Fundamental Rights.⁶¹ The act of ‘making’ an application, which triggers the status of the individual as an applicant, does not involve administrative formalities, the Court stated.⁶² These applications must be registered, and applicants must be allowed to lodge them to access the procedure in a manner ‘as straightforward as possible’, irrespective of the prospects of success. Thus, the right to apply is ultimately a prerequisite for the effectiveness of the Charter’s right to asylum.⁶³ Against this backdrop, the Court

55. Wissenschaftliche Dienste des Deutschen Bundestags, ‘Fragen zur Zurückweisung an der Grenze und zu Transit: WD 3 - 3000 - 151/23’ (2024) <www.bundestag.de/resource/blob/991160/411cba6cc614cde95a6e5b5c117553e0/WD-3-151-23-pdf.pdf>.

56. Daniel Thym, ‘Nun also doch? Zurückweisungen von Asylbewerbern aufgrund einer „Notlage“’ (*Verfassungsblog*, 4 September 2024) <verfassungsblog.de/nun-also-doch-zuruck-weisungen-von-asylbewerbern-aufgrund-einer-notlage/>.

57. Verwaltungsgericht Berlin, VG 6 L 191/25, 2 June 2025.

58. See the justification provided by Italian authorities as documented in the case law cited in Section 4.

59. See the justification provided by Slovenian authorities as documented in Upravno sodišče Republike Slovenije, I U 1490/2019, 22 June 2020.

60. Case C-821/19, *European Commission v Hungary*, EU:C:2021:930. As regards exceptions applicable to cases of subsequent applications after a final rejection in another Member State, see also Joined Cases C-123 & C-202/23, *N.A.K., E.A.K., Y.A.K. (C-123/23), M.E.O. (C-202/23) v Bundesrepublik Deutschland*, EU:C:2024:1042.

61. Case C-72/22 PPU, *M.A. v Valstybės sienos apsaugos tarnyba*, EU:C:2022:505.

62. *ibid.*, 57.

63. Furthermore, the Court of Justice broadly defines the notion of ‘competent authorities’ for receiving asylum applications (see Case C-36/20 P, *VL v Ministerio Fiscal*, EU:C:2020:495).

of Justice recently explicitly established that pushbacks, ‘in all events’, violate the Directive.⁶⁴

Some argue that an immediate rejection of asylum seekers could be compatible with EU law, but this is not convincing. These arguments often reference Article 20(1) and (4) of the Dublin Regulation within the context of the German ‘fiction of non-entry’, suggesting that procedural responsibility only arises once an individual has physically passed through a border crossing point.⁶⁵ This interpretation contrasts with the fact that border crossing points are considered part of a Member State’s territory, as implicitly supported by the Asylum Procedures Directive.⁶⁶ Furthermore, secondary law does not endorse a limitation of territorial jurisdiction through legally assuming non-entry. The applicability of the obligation to assess claims extends to those made at the border, as Article 3(1) of the Dublin Regulation and Article 3(1) of the Asylum Procedures Directive determine, and the Court of Justice confirms.⁶⁷ Consequently, the more widely accepted scholarly view, supported by German case law,⁶⁸ correctly asserts that mere physical presence on a Member State’s territory – including border and transit areas – suffices to trigger procedural responsibility under the Dublin framework.⁶⁹

The reformed CEAS rules, which will enter into effect mid-2026, include a significant emphasis on restricting secondary movements. However, they will not fundamentally alter this assessment. The Asylum Procedures Regulation⁷⁰ introduces, for example, a tighter 21-day⁷¹ deadline for lodging asylum applications from the moment of registration,⁷² and limits the right to remain to the Member State in which the individual is

64. Case C-392/22, *X v Staatssecretaris van Justitie en Veiligheid*, EU:C:2024:195, 53.

65. For a comprehensive overview of the debate in Germany, see Wissenschaftliche Dienste des Deutschen Bundestags (n 55) 10 n 23; Markus Rau, ‘Der Flüchtlingsstreit und das Recht – eine Nachlese’ (2018) 48(3) BDVR-Rundschreiben 21.

66. See Art 2(p) of the Asylum Procedures Directive.

67. Case C-823/21, *European Commission v Hungary*, EU:C:2023:504. See also Anna Lübke, ‘Ist der deutsche Transit österreichisches Hoheitsgebiet?’ (*Verfassungsblog*, 4 March 2016) <verfassungsblog.de/ist-der-deutsche-transit-oesterreichisches-hoheitsgebiet/>.

68. See the German case law cited in Section 4. As regards Germany’s responsibility under the ECHR, see *H.T. v Germany and Greece* App no 13337/19.

69. See the literature cited in Wissenschaftliche Dienste des Deutschen Bundestags (n 55) 10 n 24.

70. Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [2024] OJ L 1348.

71. The Court of Justice ruled that Ireland’s 15-day deadline breached the principle of effectiveness. See Case C-429/15, *Evelyn Danqua v Minister for Justice and Equality*, EU:C:2016:789.

72. Art 28(1) of the Asylum Procedures Regulation.

required to be present,⁷³ which arguably risks limiting access to the procedure.⁷⁴ However, the revised rules also clarify and strengthen procedural safeguards, thus even reinforcing the principles discussed above.⁷⁵ Importantly, the CEAS ‘fiction of non-entry’, also included in the Screening Regulation,⁷⁶ does not apply to internal borders.⁷⁷ Finally, the relevant derogations provided by the Crisis Regulation⁷⁸ relate to delaying registrations and do not challenge access to procedures per se.⁷⁹

Related regimes, including the Schengen Borders Code, similarly uphold fundamental principles safeguarding asylum seekers’ rights at internal EU borders. The Code explicitly mandates adherence to the prohibition of *refoulement*. It guarantees asylum seekers effective access to proper procedures, ensuring that they can remain in the country until their claims have been fully examined.⁸⁰ Additionally, the newly introduced transfer procedure under Article 23a of the revised Code cannot be applied to individuals seeking asylum.⁸¹

Finally, the requirement that Member States must ensure effective asylum access aligns with their international human rights law obligations, including under the European Convention on Human Rights (ECHR). The European Court of Human Rights (ECtHR) has found violations of Articles 3, 13, and 4 of Protocol No 4 related to the refusal or impossibility of claiming asylum in various scenarios, including at ports⁸² and land border points.⁸³ The

73. *ibid*, Art 10.

74. ECRE, ‘ECRE Comments on the Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU’ (October 2024) <ecre.org/wp-content/uploads/2024/11/ECRE_Comments_Asylum-Procedures-Regulation.pdf>.

75. Chapter II Asylum Procedures Regulation. See also Steve Peers, ‘The New EU Asylum Laws: Taking Rights Half-Seriously’ (2024) 43 Yearbook of European Law 113, doi: 10.1093/yel/yeae003.

76. Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 [2024] OJ L 1356.

77. Art 6 of the Screening Regulation.

78. Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L 1359.

79. Peers (n 75).

80. See Arts 3, 4, and 14 of the Schengen Borders Code, as also established by the ECtHR, eg in *D.A. and Others v Poland* App no 51246/17 (ECtHR, 8 July 2021) 66.

81. For a more in-depth assessment of this procedure, see Section 3.3.

82. eg *Kebe and Others v Ukraine* App no 12552/12 (ECtHR, 12 January 2017); *Sharifi and Others v Italy and Greece* App no 16643/09 (ECtHR, 21 October 2014).

83. Recently *Sherov and Others v Poland* App no 54029/17 and others (ECtHR, 4 July 2024).

Court has established that a transfer to a State deemed responsible for examining the application under the Dublin Regulation requires a thorough risk assessment related to the individual.⁸⁴ As regards the act of claiming asylum, the Court has noted that individuals are not required to request it explicitly, nor must their intention to seek asylum be expressed in any specific form.⁸⁵

2.2. *Circumventing the transfer procedure*

Beyond practices of ignoring asylum claims and denying access to procedures, more sophisticated ways of avoiding the application of Dublin safeguards have been employed. In particular, the German border control strategy includes an approach that authorities have coined as a ‘pre-Dublin procedure’. Drawing on bilateral administrative arrangements with Greece⁸⁶ and Spain,⁸⁷ the country seeks to enforce rapid returns of individuals identified as asylum seekers. Under these frameworks, those apprehended at the border with Austria who have already applied for protection in the cooperating countries shall be returned within 48 hours.⁸⁸ According to the German Government, in the case of the responsibility of another country under Dublin criteria, Member States can bilaterally agree not to comply with the take-charge and take-back procedures.⁸⁹ The

84. *H.T. v Germany and Greece* App no 13337/19.

85. See eg *Hirsi Jamaa and Others v Italy* [GC] App no 27765/09 (ECtHR, 23 February 2012).

86. Administrative arrangement between the Ministry of Migration Policy of the Hellenic Republic and the Federal Ministry of the Interior, Building and Community of the Federal Republic of Germany on cooperation when refusing entry to persons seeking protection in the context of temporary checks at the internal German-Austrian border.

87. Administrative arrangement between the Ministry of Interior of the Kingdom of Spain and the Federal Ministry of the Interior, Building and Community of the Federal Republic of Germany on cooperation between Germany and Spain when refusing entry to persons seeking protection in the context of temporary checks at the internal German-Austrian border.

88. Anna Lübke, ‘Compatibility of the Refoulement Practice under the German-Greek “Seehofer Agreement” with Union-law Requirements for Effective Legal Remedies: Expert Opinion Commissioned by PRO ASYL’ (December 2018) <www.proasyl.de/wp-content/uploads/L%C3%BCbbeGutAPASylENfinal-1.pdf>; Constantin Hruschka, ‘The Border Spell: Dublin Arrangements or Bilateral Agreements? Reflections on the Cooperation between Germany and Greece/Spain in the Context of Control at the German-Austrian Border’ (*EU Migration Law Blog*, 26 February 2019) <[eumigrationlawblog.eu/the-border-spell-dublin-arrangements-or-bilateral-agreements-reflections-on-the-cooperation-between-germany-and-greece-spain-in-the-context-of-control-at-the-german-austrian-border/?print=](http://eumigrationlawblog.eu/the-border-spell-dublin-arrangements-or-bilateral-agreements-reflections-on-the-cooperation-between-germany-and-greece-spain-in-the-context-of-control-at-the-german-austrian-border/?print=print)>.

89. See Wissenschaftliche Dienste des Deutschen Bundestags (n 55).

fiction of non-entry in domestic law would justify the detention of applicants before transfer.⁹⁰

In implementing this arrangement, German authorities typically conduct border checks on rail traffic from Austria and escort individuals seeking asylum but not holding required documents to police checkpoints for interrogations and arrest. After a search within Eurodac indicating a prior asylum application in Greece, individuals receive a form in German language indicating a rejection of entry and the decision to transfer them based on the Dublin Regulation. Transfer flights from Germany to Greece are then swiftly organized and implemented, while German asylum authorities remain uninformed of the application made.⁹¹

German courts and the ECtHR have found the arrangement unlawful, and the German Government claims that there have been no returns under this arrangement in recent years.⁹² The German Federal Police formally suspended returns under the administrative arrangements with Greece (and Spain) in November 2024.⁹³

While EU law allows bilateral cooperation within the Dublin framework, it is unequivocal on Member States' obligation to follow its procedural rules. Once the asylum application is lodged,⁹⁴ the Dublin Regulation provides key safeguards for individuals, including the right to a transfer decision, access to information, effective legal remedies, and protection against *refoulement*.⁹⁵ Moreover, the Dublin rules also detail respective admission and readmission procedures in the case of an intended transfer.⁹⁶ The regular deadlines for replying to take charge requests vary, depending on the case, between two weeks and two months. In the context of admission procedures, urgent replies can be requested with a response period of at least one week.⁹⁷ Bilateral administrative agreements are foreseen in the

90. Art 13(2) sentence 1 of the German Residence Act.

91. AIDA, 'Country Report Germany' (2025) <asylumineurope.org/reports/country/germany>. See also the facts underlying Verwaltungsgericht München, M 18 E 19.32238, 8 August 2019; M 22 E 21.30294, 4 May 2021.

92. Bundesregierung Deutschland, 'Antwort auf die Kleine Anfrage: Zurückweisungen an den deutschen Binnengrenzen im zweiten Halbjahr 2024' (Drucksache 20/14902, 2024). It is worth noting, however, that, according to the German Government, in the first half of 2024, 148 individuals apprehended at the land border with Austria were returned via the airport: Bundesregierung Deutschland, 'Antwort auf die Kleine Anfrage: Zurückweisungen an den deutschen Binnengrenzen im Jahr 2023 bzw. im ersten Halbjahr 2024' (Drucksache 20/12827, 2024) <dserver.bundestag.de/btd/20/128/2012827.pdf>.

93. Bundesregierung Deutschland, 'Antwort auf die Kleine Anfrage: Ergänzende Informationen zur Asylstatistik für das Jahr 2024 – Schwerpunktfragen zu Dublin-Verfahren' (Drucksache 20/15133, 2025).

94. Art 20(1) of the Dublin Regulation.

95. *ibid*, Chapter II.

96. *ibid*, Chapter VI.

97. *ibid*, Art 21(2).

Regulation. Their scope, however, is limited to arrangements ‘concerning the practical details of the implementation of this Regulation, in order to facilitate its application and increase its effectiveness’.⁹⁸

The Court of Justice has prioritized the proper functioning of Dublin rules – the EU’s common system for implementing the principle of mutual trust – over unilateral or bilateral approaches, including under alleged crisis conditions. The Court’s case law consequently reinforces that Member States must draw on the Regulation to determine the responsibility of other Member States and operationalize the transfer decision. For example, the Court has clarified in *A.S.* that Dublin rules apply to situations of mass influx.⁹⁹ Moreover, starting with *Ghezelbash and Karim*, the Court has regularly affirmed the right to judicial review of responsibility determinations.¹⁰⁰ In *Mengesteab* and *Shiri*, the Court emphasized strict adherence to procedural deadlines, with failures potentially shifting responsibility.¹⁰¹ The *Hassan* ruling further established that consent from the receiving country is required.¹⁰² Finally, in *Ministero dell’Interno*, the Court found that the common leaflet and the personal interview are required for subsequent applications.¹⁰³

The CEAS reform, while repealing certain Dublin safeguards, does not fundamentally challenge this reading. The Regulation on Asylum and Migration Management (RAMM)¹⁰⁴ aims to deter irregular onward migration within the EU by imposing stricter obligations on applicants, coupled with punitive measures.¹⁰⁵ This shift towards applying sanctions to secondary movement risks undermining relevant standards, including that dignity is ensured ‘continuously and without interruption’.¹⁰⁶ It also creates a

98. *ibid.*, Art 36.

99. Case C-490/16, *A.S. v Republika Slovenija*, EU:C:2017:585.

100. Case C-63/15, *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:409; Case C-155/15, *George Karim v Migrationsverket*, EU:C:2016:410.

101. Case C-670/16, *Tsegezab Mengesteab v Bundesrepublik Deutschland*, EU:C:2017:587.

102. Case C-647/16, *Adil Hassan v Préfet du Pas-de-Calais*, EU:C:2018:368; see also Joined Cases C-47 & C-48/17, *X (C-47/17), X (C-48/17) v Staatssecretaris van Veiligheid en Justitie*, EU:C:2018:900.

103. Joined Cases C-228, C-254, C-297, C-315 & C-328/21, *Ministero dell’Interno, Dipartimento per le Libertà civili e l’Immigrazione – Unità Dublino and Others v CZA and Others*, EU:C:2023:934.

104. Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 [2024] OJ L 1351.

105. Art 17 of RAMM mandates that applicants register in the first country of entry and obliges them to remain where they have registered during the Dublin procedure or in the responsible Member State. Art 18 enforces consequences, such as suspending reception conditions.

106. Case C-233/18, *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers*, EU:C:2019:956.

notable tension between the EU's asylum laws and Article 31 of the 1951 Convention.¹⁰⁷ However, the reform does not negate the basic obligations of Member States to provide asylum seekers with access to procedures and also to adhere to the EU's shared framework for conducting transfers. Bilateral cooperation remains limited to the implementation of the Regulation.¹⁰⁸ Finally, the derogations allowed by the Crisis Regulation solely relate to more flexibility with transfer deadlines.¹⁰⁹

2.3. *Invoking emergencies*

Against the backdrop of such clear legal principles, which may diverge from the policy preferences of some of the Member States, a discussion on justifying derogations for the 'maintenance of law and order and the safeguarding of internal security' based on Article 72 TFEU has come to the fore.¹¹⁰ This ambition also underlies the emergency regimes latent in domestic legal frameworks. Austria and Slovenia, for example, have provisions in their asylum laws to restrict access to procedures in times of crisis. Austria's framework requires assessments of immediate removal before initial interviews, with exceptions for serious human rights concerns.¹¹¹ Slovenia has twice sought to amend its Foreigners Act to allow a suspension of asylum rights. After the first attempt was found unconstitutional,¹¹² it reintroduced similar provisions under a 'complex crisis' framework that permits border closures with exceptions for vulnerable groups, which was again challenged by the Constitutional Court.¹¹³ Moreover, the German Government seeks to justify its recent pushback policy by invoking Article 72 TFEU.¹¹⁴ However, Member States inclined to take this path encounter two considerable obstacles: first, the Court of Justice's strict interpretation of the conditions for derogations, and second, non-derogable fundamental and human rights guarantees.

107. Case C-481/13, *Criminal proceedings against Mohammad Ferooz Qurbani*, EU: C:2014:2101.

108. Art 53 of RAMM.

109. Peers (n 75).

110. Thym (n 56).

111. Art 36 of the Austrian Asylum Act. See also Julia Kienast, '„Die Notverordnung“: Der schlafende Hund im österreichischen Asylrecht' (*BlogAsyl*, 13 January 2022) <www.blogasyl.at/2022/01/die-notverordnung-der-schlafende-hund-im-oesterreichischen-asylrecht/>.

112. Ustavno sodišče Republike Slovenije, U-I-59/17, 18 September 2019.

113. European Center for Constitutional and Human Rights (n 37); AIDA, 'Country Report Slovenia' (n 37). Slovenia's Aliens Act is compounding the issue, allowing border removals without formal orders.

114. Verwaltungsgericht Berlin, VG 6 L 191/25, 2 June 2025.

The precise substantial conditions under which Article 72 TFEU could, if at all, allow deviations from Dublin rules remain undefined. However, notwithstanding securitization trends,¹¹⁵ the Court's case law on related matters, including intra-EU mobility, maintains an exceedingly limited leeway.¹¹⁶ Member States must 'prove' that a specific context exceptionally necessitates a derogation despite existing asylum laws already incorporating mechanisms for extraordinary circumstances.¹¹⁷ Moreover, any derogation measures must be proportionate.¹¹⁸ It is thus unsurprising that all respective attempts have thus far failed.¹¹⁹

Additionally, even if exceptional circumstances could justify deviations, any policy implemented at internal borders must adhere to non-derogable fundamental and human rights. Critically, the Court of Justice has connected the obligation to provide access to procedures with the Charter's right to asylum in the context of emergencies created by mass influx at internal borders. It established that depriving individuals of the possibility to make or lodge an application prevents them 'from effectively enjoying the right enshrined in Article 18 of the Charter'.¹²⁰ Moreover, the need for thorough assessments underlies the Court's interpretation of the principle of *non-refoulement* in Article 19(2) of the Charter. Although the

115. The Court has not excluded that individual migrants can pose a security threat: Editorial (n 1) 294.

116. Daniel Thym, *European Migration Law* (OUP 2023) 273–275; ECRE, 'Derogating from EU Asylum Law in the Name of "Emergencies": The Legal Limits under EU Law' <www.ecre.org/wp-content/uploads/2020/06/LN_6-final.pdf>; Salvatore F Nicolosi, 'Addressing a Crisis through Law: EU Emergency Legislation and its Limits in the Field of Asylum' (2021) 17(4) *Utrecht Law Review* 19, doi: 10.36633/ulr.776; Twenty-two academics, led by Professor Nora Markard, 'The Absolute Prohibition of Refoulement and Exceptional Circumstances: Third Party Intervention in the Case of C.O.C.G and Others v. Lithuania before the European Court of Human Rights' (Bonavero Reports Series 2025) <www.law.ox.ac.uk/sites/default/files/2025-01/Bonavero%20Report%20-%20Non-refoulement_1.pdf>.

117. For a systematic analysis of Court of Justice case law, see Hubert de Verdelhan, 'Art. 72 TFEU as Seen by the Court of Justice of the EU: Reminder, Exception, or Derogation?' (2024) 9(3) EP 1330.

118. Joined Cases C-715, 718 & 719/17, *Commission v Poland, Hungary, and the Czech Republic*, EU:C:2020:257, 147, 170. Furthermore, the outlook of a system collapse relates to pan-European minimum standards. Moreover, Art 72 has been interpreted to demand EU-wide consultation with EU institutions before unilateral actions: Opinion of AG Mazák in Case C-203/07, *Hellenic Republic v Commission of the European Communities (Project Abuja)*, EU:C:2008:270, 119.

119. See eg Joined Cases C-368 & C-369/20, *Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, EU:C:2022:298; Joined Cases C-715, C-718 & C-719/17, *European Commission v Republic of Poland and Others*; Case C-823/21, *European Commission v Hungary*, ECLI:EU:C:2023:504.

120. Case C-72/22 PPU, *M.A. v Valstybės sienos apsaugos tarnyba*, 63.

Court views *non-refoulement* as prohibiting pushbacks only ‘to a third country on whose territory they incur the risk of persecution’,¹²¹ it emphasizes its absolute nature,¹²² requires authorities to conduct an updated review sensitive to changes in circumstances,¹²³ and demands an appeal against removal decisions with automatic suspensory effect.¹²⁴

In the ECHR framework, the procedural obligations of Member States under Article 3 are central. In the landmark Grand Chamber case of *Ilias and Ahmed*, the Court unanimously found a violation for Hungary returning individuals to Serbia without a prior detailed individual assessment.¹²⁵ The Government’s presumption of Serbia as a safe country lacked sufficient basis, the decisions ignored the UNHCR’s findings on the risk of denial of effective asylum procedures and potential chain *refoulement*, and the authorities worsened the applicants’ situation by encouraging illegal entry into Serbia.¹²⁶ Of particular relevance for the intra-EU context beyond Dublin transfers is a recent decision of the ECtHR on the German ‘pre-Dublin’ procedures, thus confirming its 2014 *Sharifi* ruling against a return from Italy to Greece. Germany violated Article 3 for failing to evaluate whether Greece provided adequate asylum procedures and humane conditions.¹²⁷ Unlike in the circumstances underlying *Ilias and Ahmed*, the countries here cooperated in the procedure. Yet, no guarantees were provided regarding access to a procedure or adequate reception conditions.¹²⁸

It has been claimed, however, that the ECtHR would apply exceptions developed in *N.D. and N.T.* for Article 4 of Protocol 4 of the Convention to the assessment under Article 3.¹²⁹ Moreover, it has been suggested that if the neighbouring country is ‘evidently safe’, decisions based on situation reports rather than individual assessments could meet the ECHR

121. Case C-392/22, *X v Staatssecretaris van Justitie en Veiligheid*, 3.

122. Joined Cases C-391/16, C-77 & C-78/17, *M and Others v Commissaire général aux réfugiés et aux apatrides*, EU:C:2019:403.

123. Case C-156/23 [Ararat], *K, L, M, N v Staatssecretaris van Justitie en Veiligheid*, EU:C:2024:892.

124. Case C-181/16, *Sadikou Gnandi v État belge*, EU:C:2018:465.

125. *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 21 November 2019) 137.

126. *ibid.*, 163. Furthermore, the Court clarified it was irrelevant to assess the existence of an ‘arguable claim’ related to Art 3 risks in the country of origin (147).

127. *H.T. v Germany and Greece* App no 13337/19.

128. *ibid.*

129. Daniel Thym, ‘Kippt in Brüssel das individuelle Asylrecht?’ (*Verfassungsblog*, 12 February 2025) <verfassungsblog.de/kippt-in-brussel-das-individuelle-asylrecht/>. In *N.D. and N.T. v Spain* App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020), the Court legitimized pushbacks under certain circumstances, applying a ‘two-tier’ test related to the availability of legal means of entry. Whether the Grand Chamber will follow this approach in pending cases, particularly *C.O.C.G. and Others v Lithuania* App no 17764/22, remains to be seen.

standards.¹³⁰ Such a view, however, contrasts with the clear statements of ‘general principles’ the Court has developed in *Ilias and Ahmed* and since confirmed in a series of judgments. It regularly reiterates that in all removal cases involving asylum seekers, including towards other Member States, a thorough assessment of the risk of denied access to a procedure protecting against *refoulement* is required.¹³¹

The requirement for individualized assessments is also justified by the fact that a generally positive evaluation of the recipient country cannot conclusively determine the return’s impact on a specific individual. For instance, a thorough individual review is necessary to identify potential vulnerabilities that may decisively alter an assessment solely based on general safety assessment. Furthermore, the real possibility of chain *refoulement* is to be considered. For example, as reports and case law indicate, returns from Italy, Austria, and Slovenia along the Balkan route involve such a risk. From Slovenia, individuals were further pushed back to Croatia, where the ECtHR has found multiple violations related to collective expulsions and denial of access to asylum.¹³² From there, asylum seekers were removed to a non-EU country, Bosnia and Herzegovina, where they faced limited access to asylum procedures, inadequate living conditions, a lack of basic necessities, and heightened vulnerability to violence and exploitation.¹³³

3. Eroding the Return Directive

In principle, the return of third-country nationals who do not apply for asylum at internal borders is governed primarily by the Return Directive. This instrument seeks to ensure that the common return procedure respects the fundamental rights and dignity of individuals.¹³⁴ In this context, the Directive obliges the Member States to implement a ‘common return procedure’ with a gradual enforcement of measures from lenient to

130. Thym (n 56).

131. *M.K. and Others v Poland* App nos 40503/17, 42902/17 and 43643/17 (ECtHR, 23 July 2020); *Sherov and Others v Poland* App nos 54029/17 and 3 others (ECtHR, 4 April 2024); *S.S. and Others v Hungary* App nos 56417/19 and 44245/20 (ECtHR, 12 October 2023); *O.M. and D.S. v Ukraine* App no 18603/12 (ECtHR, 15 December 2022); *D.A. and Others v Poland*.

132. See eg *S.B. and Others v Croatia and 2 other applications* App no 18810/19 (ECtHR, 26 March 2020).

133. See the Italian and Slovenian case law cited in Section 4.

134. See also the Court’s emphasis to that effect, eg in Case C-474/13, *Pham*, EU: C:2014:2096, 20, and C-601/15 PPU, *N.*, EU:C:2016:84, 75.

coercive.¹³⁵ However, when considering its provisions for derogation in interaction with the Schengen Borders Code and bilateral agreements, the reality of an EU return policy fragmented by national sovereign interests comes to the fore.¹³⁶

The analysis of the selected practices and case law shows a persistent bypassing of the Return Directive through summary returns that has not only led to legal ambiguities but also to significant procedural irregularities and violations of individual rights.¹³⁷ In France, individuals were stopped at border control points without clear legal justifications or well-defined zones, following the reintroduction of internal border controls due to security concerns under Article 25 of the Schengen Borders Code (current 25).¹³⁸ Reports indicate that returns are justified solely by a lack of identification documents and characterized by inadequate access to information, legal counsel, interpretation, and recourse mechanisms.¹³⁹ Individuals, including unaccompanied minors, were reportedly held in so-called ‘shelter’ accommodations, functioning as detention centres without judicial oversight. Finally, racial profiling by the border police and the diversion towards dangerous routes have been reported.¹⁴⁰ Similarly, Italy’s pushback process towards Slovenia, including joint patrols and increasing technological surveillance, appears to disregard formal administrative procedures.¹⁴¹ According to reports, affected individuals frequently experienced a denial of due process, limited access to translators or legal counsel, and are coerced into signing documents in Italian.¹⁴² In Slovenia, authorities have employed returns based on informal procedures with Croatia, circumventing

135. Galina Cornelisse and Mădălina Moraru, ‘Judicial Interactions on the European Return Directive: Shifting Borders and the Constitutionalisation of Irregular Migration Governance’ (2022) 7(1) EP 127.

136. Montaldo and others (n 17) 191.

137. Beyond the ignoring of asylum claims described under Section 2.1.

138. Defender of Rights (n 28); Pistoia (n 10).

139. As determined, eg in Tribunal administratif de Nice, 1701211, 31 March 2017; 1800714 and others, 23 February 2018; 2000856, 2000858, 24 February 2020. See also Montaldo and others (n 17); Defender of Rights (n 28).

140. Particularly in the Hautes-Alpes region, pushback practices have resulted in the use of dangerous mountain routes, where at least 40 individuals have died between 2015 and 2023. At the French-Spanish border, between 2021 and 2022, at least 12 migrant deaths have occurred. See AIDA, ‘Country Report France’ (2025) <asylumineurope.org/reports/country/france>.

141. COM(2024) 173 final. These practices, however, encountered resistance from Slovenian authorities, who contested many returns due to insufficient evidence of prior transit. Slovenia has clarified that it accepts all persons meeting the conditions for simplified readmission under its bilateral agreement with Italy. The low acceptance rate has reportedly contributed to the reintroduction of border controls.

142. Defender of Rights (n 28).

procedural safeguards.¹⁴³ Affected individuals are often uninformed about their rights, unable to contest their removal, and misled about the nature of their detention. Reports indicate inadequate interpretation services, coerced signatures on untranslated documents, and deficient police records omitting critical details, such as whether the individual intended to seek asylum.¹⁴⁴ Moreover, the return policy of Member States has resulted in documented cases of chain returns, particularly in the context of returns involving Italy, Slovenia, Croatia, and, ultimately, Bosnia.¹⁴⁵ Finally, Member States have increasingly resorted to informal bilateral arrangements to speedily remove irregularly entering third-country nationals outside the common return procedure,¹⁴⁶ exacerbating concerns about transparency and accountability, and violations of fundamental rights remaining unnoticed.¹⁴⁷

Against this backdrop, this section examines the interaction between the Return Directive and the Schengen Borders Code, focusing on two measures of derogation which the Directive principally legitimizes: readmission agreements; and refusals of entry, developed based on a wide interpretation of the notion of ‘borders’ under the Schengen Borders Code. Finally, it investigates the implications of introducing the intra-EU transfer procedure under the revised Schengen Borders Code and the European Commission’s proposal for a Return Regulation. Overall, the section highlights the role of the Court of Justice’s judicial oversight in the ongoing tension between national border control practices and the need for a coherent and rights-compliant EU return framework.

3.1. Misusing the refusal of entry procedure under the Schengen Borders Code

Member States have increasingly relied on the refusal of entry procedure under the Schengen Borders Code at internal land borders in the context of frequently and increasingly reintroduced temporary border

143. The Slovenian Ombudsperson has criticized these agreements, particularly for their failure to assess the principle of non-refoulement and the lack of effective legal remedies: Human Rights Ombudsman of the Republic of Slovenia (n 35).

144. *ibid*; European Center for Constitutional and Human Rights (n 37); AIDA, ‘Country Report Slovenia’ (n 37) See also the Slovenian case law cited in Section 4.

145. AIDA, ‘Country Report Italy’ (n 33). See also Tribunale Ordinario di Roma, 56420/2020, 18 January 2021; 7045/2021, 27 April 2021; 3938/2022, 9 May 2023.

146. For instance, between Germany and Austria, and France and Spain, according to COM(2024) 173 final, and confirmed by experts.

147. On the relationship between informality and human rights violations, see also Eleonora Frasca and Emanuela Roman, ‘The Informalisation of EU Readmission Policy: Eclipsing Human Rights Protection Under the Shadow of Informality and Conditionality’ (2023) 8(2) EP 931.

controls.¹⁴⁸ Particularly since 2015, they have implemented legal mechanisms at internal borders that rely on an instrument initially intended only for external borders, thereby evading the common return framework through simplified procedures and imprisonment.¹⁴⁹

The refusal of entry procedure under Article 14 of the Schengen Borders Code and the common return procedure outlined in the Return Directive are distinct but complementary legal regimes governing the entry and stay of third-country nationals in the EU. Article 14 of the Code addresses individuals who do not meet entry conditions at external borders. At the same time, the Return Directive establishes uniform procedures for returning those staying illegally within a Member State's territory. However, the interaction and applicability of these frameworks when internal border controls are reintroduced have been contested over the last decade.

The use of refusals of entry at internal borders to derogate from the common return procedure is based on a controversial interpretation of the derogations permitted under the Return Directive, read in conjunction with the Schengen Borders Code – an interpretation ultimately rejected by the evolving Court of Justice case law. Article 2(2)(a) of the Return Directive allows Member States to exclude from its scope individuals refused entry under Article 14 of the Schengen Borders Code. When read alongside Article 32 of the Code, which provides that rules applicable at external borders apply *mutatis mutandis* at internal borders where controls have been temporarily reintroduced, this interpretation has been used by some Member States to justify practices that derogate from the common return procedure. France, for example, codified this approach by amending its domestic legislation to extend refusal-of-entry rules to internal borders subject to reintroduced controls.¹⁵⁰ Similarly, as noted by the European

148. In the last decade, there have been more than 400 reintroductions of internal border controls, compared to a little over 30 in the previous decade. See European Commission, 'Temporary Reintroduction of Border Control' <home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en>. Until 2024, France had used refusals of entry at reintroduced internal border controls, particularly at the French-Italian border, as also initially validated by Conseil d'État, 463850, 27 July 2022. From September 2024, Germany has reinstated border checks at all its internal borders. Switzerland has raised the issue of Germany's practice following the Court of Justice's judgment in *ADDE and Others* (COM(2024)173 final (n 27)).

149. Defender of Rights (n 28); Bundesregierung Deutschland, 'Antwort auf die Kleine Anfrage' (n 93); Ministero dell' Interno, 'N. 400.A/12.378 (563)' <medea.asgi.it/wp-content/uploads/2024/07/Accesso-civico-Brambilla-Bove-ripristino-controlli-frontiera-Slovenia-2.pdf>. See also the irregularities in the practice of Member States described in the introduction to Section 3.

150. Ordonnance n° 2020-1733 du 16 décembre 2020 portant partie législative du code de l'entrée et du séjour des étrangers et du droit d'asile.

Commission,¹⁵¹ Germany has interpreted the temporary reintroduction of internal controls as a fast-tracked, less burdensome means of preventing individuals who do not meet entry conditions from accessing its territory.¹⁵²

However, a thorough interpretation in line with the case law of the Court of Justice leads to a more principled and nuanced understanding of the scope of permissible derogations, the distinction between internal and external EU borders, and the relationship between the refusal-of-entry procedure and the common return procedure.

The Return Directive establishes an EU-wide framework for return and requires that coercive measures be applied progressively, from voluntary departure to removal and detention.¹⁵³ Unless Article 2 derogations apply – which, beyond refusals of entry, cover individuals intercepted ‘in connection with the irregular crossing’ of external borders¹⁵⁴ or in relation to criminal offences¹⁵⁵ – the Schengen Borders Code requires that the common return procedure be followed.¹⁵⁶ The Court of Justice has interpreted these derogations as subject to additional safeguards: border-related derogations must be explicitly set out in national legislation.¹⁵⁷ In cases of doubt, a presumption in favour of the Directive’s applicability serves to prevent arbitrary derogations.¹⁵⁸ Even when border-related derogations are invoked, minimum guarantees must be upheld, including limited use of coercive measures, access to emergency health care, consideration of the needs of vulnerable individuals, and respect for the principles of *non-refoulement* and the best interests of the child.¹⁵⁹

In this context, the distinction between internal and external borders is crucial. Indeed, the equating of internal and external borders in the practice of Member States has led to inconsistencies in the application of the common return procedure, undermining the applicability of its procedural

151. European Commission, ‘Report from the consultation with the Member States as regards the internal borders controls reintroduced by Denmark, Germany, France, Austria, Norway and Sweden between May and November 2023’, SWD(2023) 388 final.

152. The German approach, including detention, also relies on a domestic rule that treats apprehended individuals near internal borders as though they have not formally entered the territory: Art 13(2) sentence 1 of the German Residence Act.

153. Madalina Moraru, ‘EU Return Directive: A Cause for Shame or an Unexpectedly Protective Framework?’ in Evangelia Tsourdi and Philippe de Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar 2022) 436.

154. A vague formulation that has led to varying national practices and raised compliance concerns.

155. Art 2(2)(b).

156. Art 13(1).

157. Otherwise, the Return Directive remains applicable: Case C-297/12, *Filev and Osmani*, EU:C:2013:569.

158. Case C-546/19, *Westerwaldkreis*, EU:C:2021:432.

159. Art 4 of the Return Directive.

safeguards. The Court of Justice has consistently rejected this approach, strictly interpreting the notion of external borders to ensure that practices at internal border controls do not hinder the application of the common return procedure. In *Affum*¹⁶⁰ and *Arib*,¹⁶¹ the Court held that the two situations for derogation envisaged in Article 2(2)(a) of the Return Directive apply exclusively to crossing of a Member State's external border, as defined in Article 2 of the Schengen Borders Code. These derogations are limited in scope and require a clear spatial and temporal connection to the act of crossing an external border. In short, reintroducing controls would not transform internal borders into external ones. The Court therefore concluded that individuals cannot be subjected to imprisonment under national criminal law solely on the basis of irregular entry across an internal border, unless the return procedure has first been unsuccessfully applied.¹⁶²

In response, the French Government argued that the Court's judgments rendered the use of Article 14 of the Schengen Borders Code ineffective and undermined the derogation provided by Article 2(2)(a) of the Return Directive.¹⁶³ Several migrant rights organizations challenged France's continued practice of using the refusal of entry as means of derogating from the safeguards of the common return procedure before the *Conseil d'État*, which referred preliminary questions to the Court of Justice in the *ADDE and Others* case. In essence, the Court was asked whether refusals of entry could be applied at internal borders and how such refusals relate to the return procedure. The Court of Justice acknowledged that Member States may apply refusals of entry at internal borders where controls have been reintroduced. However, the Court emphasized that such measures must comply fully with the procedural safeguards required by the Return Directive, and thus rejected the lawfulness of derogating from the common return procedure. Regardless of whether individuals are apprehended at authorized internal border crossing points or in their vicinity, the Directive remains applicable, ensuring a uniform process that upholds individual rights.

The Court of Justice has rejected the expansion of the concept of external borders to encompass areas deep within national territory – a

160. Case C-47/15, *Sélina Affum v Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai*, EU:C:2016:408, 69.

161. Case C-444/17, *Préfet des Pyrénées-Orientales v Abdelaziz Arib, Procureur de la République près le Tribunal de grande instance de Montpellier, Procureur général près la cour d'appel de Montpellier*, EU:C:2019:220, 45 and 67.

162. *ibid.*

163. See the French Government's observations in Case C-143/22, *Association Avocats pour la défense des droits des étrangers (ADDE) and Others v Ministre de l'Intérieur*, EU:C:2023:689.

practice that creates so-called ‘shifting borders’, where individuals in transit or near borders are excluded from legal protections.¹⁶⁴ According to the Court, a refusal of entry may be issued only to individuals intercepted while irregularly crossing at an authorized external border crossing point. Therefore, the French practice of conducting internal border controls more than 10 kilometres inside the country cannot be classified as external border situations and therefore does not fall under the derogation provided in Article 2(2)(a) of the Return Directive. Consistent with the broader case law of the Court of Justice¹⁶⁵ and ECtHR,¹⁶⁶ the Court has also reinforced that the criminalization of mere irregular entry, regardless of whether internal border controls have been temporarily reintroduced, is incompatible with EU law.

The Court of Justice has thus taken a principled stance, affirming the necessity of applying the common return procedure with its fundamental rights safeguards at internal borders, despite the reintroduction of internal border controls. However, concerns about the practical implementation of the *ADDE and Others* judgment remain. The 2024 State of Schengen Report mentions, for example, that Austria reports operational challenges and a lack of bilateral coordination in the context of Germany’s failure to implement the *ADDE and Others* judgment.¹⁶⁷ Similarly, inconsistent application by Germany has been flagged by Switzerland. It has been reported that France has not aligned its procedures with the judgment, according to Spanish authorities. In Slovenia, a need to adjust practice in response to the ruling has been acknowledged, while in Italy authorities have indicated that the judgment’s implications are under evaluation.¹⁶⁸ Moreover, it has been observed that France initially responded to the judgment by ceasing formal refusal-of-entry procedures. Instead, France reportedly now relies on informal returns conducted under bilateral readmission agreements – a broader trend that is explored in the following section.¹⁶⁹

3.2. Relying on bilateral readmission agreements

Under Article 6(3) of the Return Directive, Member States may derogate from the standard EU return procedure by relying on bilateral readmission

164. Cornelisse and Moraru (n 135).

165. Cases *Affum*, *Arib*, and *ADDE and Others* as cited above.

166. *Mallah v France* App no 28681/08 (ECtHR, 10 November 2011).

167. COM(2024)173 final (n 27) 5.

168. *ibid.*

169. See eg Committee Against Torture, ‘Concluding observations on the eighth periodic report of France’ (30 April 2025) UN Doc CAT/C/FRA/CO/8; Defender of Rights (n 28); AIDA, ‘Country Report France’ (n 140).

agreements concluded before 13 January 2009. This derogation from the obligation to directly return third-country nationals outside the EU permits simplified procedures for returning individuals who do not meet entry or residence conditions to another Member State. However, the receiving Member State still needs to issue a return decision and comply with the procedural safeguards laid out in the Directive, and ultimately return the third-country national outside the EU. The European Commission has further clarified that these agreements may be amended and renewed, provided they do not fundamentally alter the original arrangement.¹⁷⁰

Despite this limited derogation, Member States have made extensive use of bilateral readmission agreements,¹⁷¹ often invoking them as the basis for fast-track transfers, whereby both the issuing and the receiving Member State derogate from the common return procedure. Many of these agreements were signed long before the Return Directive entered into force – some dating back to the 1960s,¹⁷² with others from the 1990s and early 2000s.¹⁷³ Their core aim is to enable the swift return of individuals to the Member State from which they entered, usually a neighbouring country.¹⁷⁴ These agreements are often tied to broader bilateral cooperation frameworks, including border police cooperation,¹⁷⁵ whereby police authorities operate on the territory of neighbouring States to prevent the entry of individuals.¹⁷⁶

170. European Commission, ‘Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common “Return Handbook” to be used by Member States’ competent authorities when carrying out return-related tasks’ [2017] OJ L 339 (Return Handbook), on the interpretation of Art 6(3).

171. All the Member States have concluded readmission agreements with their neighbouring Member States. Only Austria and Italy have jointly 36 readmission agreements with other European countries; Germany also has readmission agreements with all its neighbouring countries, according to Jean-Pierre Cassarino, ‘Inventory of the Bilateral Agreements Linked to Readmission’ <www.jeanpierrecassarino.com/datasets/ra/>.

172. For instance, the readmission agreement between Austria and Belgium.

173. Mostly with the Central and Eastern European Countries, with the latest ones concluded with Croatia, before its EU accession.

174. However, a few readmission agreements were also concluded between non-neighbouring Member States, such as those concluded by Germany and Italy with Greece.

175. These agreements are covered by Art 23 of the Schengen Borders Code, which permits police activities if they do not equate to internal border checks: Montaldo and others (n 17) 192. On police cooperation at internal borders, see Monika Weissensteiner, ‘Cross-Border Police Cooperation and “Secondary Movements”. On Reconfigurations in Enforcing Differential Mobility Rights within the Spatial-Legal Schengen Space’ (2021) 17(4) Utrecht Law Review 73, doi: 10.36633/ulr.779. Note also efforts to strengthen cross-border police cooperation within the Prüm framework (Council Decision 2008/615/JHA of 23 June 2008).

176. For example, German police operating on Swiss territory rejected the entry of 19,179 individuals based on a 1961 bilateral agreement. See Bundesregierung Deutschland, ‘Antwort der Bundesregierung auf die Kleine Anfrage – Drucksache 20/14387’ (n 31) 15.

However, significant legal and procedural issues arise from the use of these agreements. First, many of them lack adequate procedural safeguards. While some include basic protections – such as exclusions for refugees, asylum seekers, Stateless persons, and unaccompanied minors (see Section 2.1) – others omit even these minimum standards.¹⁷⁷ Moreover, the implementation of these safeguards is often inconsistent or lacking in practice. Key procedural rights, such as access to remedies, the right to appeal, and the principle of *non-refoulement*, are not always guaranteed. There is also substantial divergence in procedural timelines: while some agreements allow three months to issue a readmission request, others permit only three days, raising concerns about due process and arbitrariness.¹⁷⁸

Despite the European Commission's efforts to replace the intra-EU readmission agreements with a unified EU return procedure, political pressures ensured their use as a derogation under Article 6(3) of the Return Directive.¹⁷⁹ Multiple questions regarding the limits of this provision remain, such as whether chain readmissions across multiple Member States are permissible. Furthermore, it is unclear whether both the transfer and receiving Member States are bound by the Directive's procedural safeguards, like the right to appeal or the principle of *non-refoulement*. Significant variations in the application of readmission agreements across Member States are, to a certain extent, the natural result of these ambiguities.¹⁸⁰

These shortcomings have prompted legal scrutiny. The Court of Justice has clarified how Article 6(3) of the Return Directive should be interpreted. In its *Affum* judgment, the Court underscored that derogations from the Return Directive must be interpreted narrowly and applied in a manner that upholds the Directive's objectives and procedural guarantees. It made clear that bilateral readmission agreements cannot be used to bypass entirely the return procedure established under EU law. Once a person has been readmitted under such an agreement, the Member State receiving the individual is obliged to apply the full return procedure, including safeguards such as *non-refoulement*, access to legal remedies, and judicial oversight.

The Court also affirmed that when a Member State carries out a transfer under a readmission agreement, it is implementing EU law and is therefore

177. See eg the agreements between France and Spain, Italy and Greece, Slovenia and Croatia, and France and Italy, as cited in Section 2.

178. Compare eg the Austria-Slovenia with the Italy-Greece agreement, as cited in Section 2.

179. Fabian Lutz, *The Negotiations on the Return Directive: Comments and Materials* (Wolf Legal Publishers 2010) 45.

180. COM(2024)173 final (n 27).

bound by the Charter of Fundamental Rights of the European Union.¹⁸¹ Crucially, the Court ruled that detention cannot be used in the context of fast-track transfers under readmission agreements, as this would contradict the principle of expediency that such transfers are intended to serve.¹⁸²

In interpreting Article 6(3) of the Return Directive, the Court rejected its use as a general exemption from the Directive. Instead, it described it as a narrowly framed exception – one that allows a Member State to return a person to the Member State they arrived from, but not to initiate further transfers based on a chain of successive readmission agreements.¹⁸³ This has clear implications for practices observed in countries such as Italy, Slovenia, and Croatia, where individuals have been subject to multiple onward transfers without access to the guarantees required under the Return Directive. According to the *Affum* judgment, once readmission has occurred, the Member State of transfer is bound to apply the common return procedure, instead of executing another transfer under a readmission agreement.

Despite the Court of Justice's clarifications, serious concerns remain. The broad and vague wording of Article 6(3) gives Member States wide discretion, with no clear, explicit requirement within the Directive to comply with core procedural and substantive safeguards, except those resulting from the EU Charter of Fundamental Rights. This not only risks undermining the Charter rights of affected individuals but also challenges the principles of loyal cooperation and *effet utile* that underpin EU law.¹⁸⁴ Against this backdrop, the Court of Justice's decision to interpret and limit the use of the derogation – rather than invalidate it – has been seen by some commentators as a pragmatic response to political realities.¹⁸⁵

The 2025 European Commission proposal for a Return Regulation, which might replace the current Return Directive, not only retains the use of readmission agreements as a derogation from the obligation to issue a return decision, but also removes the existing standstill clause.¹⁸⁶ This change would allow Member States to rely not only on agreements

181. Case C-47/15, *Affum*, 74 and 85. This judgment follows previous rulings on the Charter's applicability in cases of derogations from immigration law, such as Case C-403/16, *Soufiane El Hassani v Minister Spraw Zagranicznych*, EU:C:2017:960, 26.

182. Case C-47/15, *Affum*, 52, 55, 56.

183. The Commission's Return Handbook supports this interpretation.

184. Similar challenges posed by the EU's readmission agreements have been argued to shake the very constitutional edifice of the EU. See Violeta Moreno-Lax, 'EU Constitutional Dismantling through Strategic Informalisation: Soft Readmission Governance as Concerted Dis-integration' (2024) 30(1–2) ELJ 29, 29, doi: 10.1111/eulj.12506.

185. Giovanni Zaccaroni, 'The Pragmatism of the Court of Justice on the Detention of Irregular Migrants: Comment on *Affum*' (2017) 2(1) EP 449, 454.

186. Arts 8(1)(b) and 44 of COM(2025) 101 final.

concluded before 13 January 2009, but also on future agreements, thereby significantly expanding the scope of the derogation. In light of the ongoing legal uncertainty surrounding the use of such agreements, the principles established by the Court of Justice should serve as a guiding framework to ensure their interpretation and implementation remain consistent with EU law and fundamental rights protections.

3.3. *The new transfer procedure under the revised Schengen Borders Code*

The 2024 revision of the Schengen Borders Code introduces a new fast-track transfer process at EU internal borders, permitting an additional derogation from the principle of direct return to third countries under the common return framework. This mechanism allows expedited transfers of individuals between Member States within 24 hours under a bilateral cooperation framework. While safeguards are foreseen, concerns remain about the risk of circumventing return procedures, potentially weakening the principle of *non-refoulement*. Thus, the revised Code's interplay with existing return practices, bilateral readmission arrangements, and EU legal standards requires scrutiny. This section will examine the characteristics of the new procedure, compare it to existing practices of derogation, and conclude with key legal principles that should guide its application.

The primary objective of the new fast-track transfer procedure under the revised Schengen Borders Code is to offer Member States a legal and operational alternative to the reintroduction of internal border controls, thereby preserving the Schengen Area.¹⁸⁷ By facilitating expedited returns within an inter-State cooperative framework, the measure aims to strike a balance between managing irregular migration and maintaining the free movement of persons.

Article 23(a) of the Schengen Borders Code permits Member States to transfer individuals apprehended in internal border areas to a neighbouring Member State if the following cumulative conditions apply: (1) the individual is apprehended during checks involving the competent authorities of both Member States within the framework of bilateral cooperation, including joint police patrols; (2) there are clear indications that the person arrived directly from the other Member State and it is established that he or she lacks a right to stay based on immediately-available information such as through documents, statements, or database searches. The transfer procedure excludes the sections of internal borders

187. See also Vasiliki Apatzidou, 'Schengen Reform: "Alternatives" to Border Controls to Curb "Secondary Movements"' (2022) 7(2) EP 573, 577.

where temporary controls have been (re)introduced.¹⁸⁸ While minors are not excluded, the provision exempts its application, similar to several intra-EU readmission procedures, to specific individuals, such as long-term residents, visa holders, family members, and international protection applicants and beneficiaries.¹⁸⁹

The procedure thus codifies informal practices already employed by certain Member States, notably those relying on confidential cooperation between countries' police authorities.¹⁹⁰ By permitting Member States to conduct transfers based on bilateral agreements and also on the broad notion of bilateral cooperation frameworks, which includes but is not restricted to joint police patrols, the revised Code significantly extends derogations from the principle of direct return to third countries as set out in the Return Directive and supplements Article 6(3) of the Return Directive.

The wide discretionary powers granted to the Member States raise concerns regarding the rule of law, the principle of effectiveness of the Directive,¹⁹¹ procedural consistency, transparency, and compliance with the common return procedure. However, the provision also introduces necessary safeguards currently lacking in practices based on intra-EU readmission agreements and chain readmission. For example, the revised Code tackles the racial profiling that certain Member States have employed¹⁹² by inserting an express obligation to respect the principle of non-discrimination enshrined in Article 21 of the Charter.¹⁹³ In addition, it obliges the Member States to issue written and reasoned transfer decisions using a standardized template,¹⁹⁴ where national authorities must also provide information on appeal, such as the deadline and information on legal representation for judicial appeal. Finally, the

188. Recital 30 of the revised Schengen Borders Code.

189. *ibid*, Recital 27.

190. *eg* as observed between Italy-Slovenia and France-Italy. Note also the relevance of joint operations according to the Prüm framework (n 175).

191. The MEP Rapporteur for the revision of the Schengen Borders Code suggested the deletion of the transfer procedure, given that it contradicts the principles underlying the Schengen Area (Amendment 24 in Draft Report 2021/0428(COD) on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, COM (2021)0891 – C9-0473/2021 – 2021/0428(COD)).

192. Iker Barbero, 'A Ubiquitous Border for Migrants in Transit and Their Rights: Analysis and Consequences of the Reintroduction of Internal Borders in France' (2020) 22(3) *European Journal of Migration and Law* 366.

193. Recital 28.

194. See Annex XII Part B.

transferring Member State has only 24 hours to execute the transfer, thus seeking to prevent its misuse in prolonged removal scenarios.¹⁹⁵

The revised Schengen Borders Code also strengthens individual and institutional accountability. Article 23(a)(3) establishes a mandatory judicial remedy, allowing transferees to appeal the decision before a court. However, the transfer procedure does not provide for an automatic suspensive effect of appeal. This raises significant concerns about compliance with established case law, such as the *ADDE and Others* and *Gnandi* judgments, which underscore the need for effective remedies.¹⁹⁶ Additionally, Article 23(a)(7) obliges the Member States to report annually the data regarding the use of the procedure. Furthermore, two leading principles developed by the Court of Justice concerning the readmission procedure are also relevant to the transfer procedure. First, when Member States rely on intra-EU readmission agreements, the receiving Member State should apply the common return procedure.¹⁹⁷ Second, the transferring Member State and the receiving Member State act within the scope of the Return Directive, meaning that the Charter binds both States.¹⁹⁸

In sum, intending to save the Schengen Area, the EU legislature integrated informal national practices of derogation into EU law with the new transfer procedure, while introducing a set of minimum procedural safeguards. As demonstrated more broadly in the context of the Return Directive, the Court of Justice could further strengthen individual rights through introducing additional safeguards.¹⁹⁹ However, similar to intra-EU readmission agreements, the concern that the procedure is used as a derogation from the common return procedure is valid. Finally, its practical success remains to be tested, as Member States – including France, which initiated the measure – thus far show operational inertia in implementing the procedure, indicating a preference for relying on pre-existing agreements and informal practices that involve fewer procedural requirements.²⁰⁰

195. As observed in the readmission transfer procedure under Art 6(3) of the Directive, where transfers could take 24 hours to days or weeks, as shown eg by the French practice underlying the *Affum* and *ADDE and Others* cases.

196. Art 19(2) requires automatic suspensive effect for appeals when a risk of refoulement exists.

197. Case C-47/15, *Affum* and Case C-143/22, *ADDE and Others*.

198. For an extensive analysis, see Upravno sodišče Republike Slovenije, I U 1490/2019, 22 June 2020.

199. See Cornelisse and Moraru (n 135).

200. As noted by a State representative during an intervention at a national conference on asylum and migration held in the Czech Republic. Similarly, Montaldo and others (n 17) 202.

4. The role of domestic courts

The analysis in this article has revealed a pattern of Member States circumventing common asylum and immigration procedures based on outright non-compliance with, or overstepping of, provisions for derogation. In this context, the Court of Justice has conveyed key clarifications on the legal principles applicable and the scope of derogations, thereby fostering uniformity. In the rare instances it intervened, the ECtHR has emphasized the continuous applicability of obligations under the prohibition of *refoulement*. However, the reach of these interventions remains limited.²⁰¹

Domestic courts have assumed a crucial and complementary function in this world of a persistent accountability gap and continuous pressure on the EU's legal framework. We examine how they have navigated factual circumstances and complex overlapping instruments and identify factors hindering or facilitating their role. While the context-driven diversity of judicial engagement is notable, key common patterns also emerge. Overall, our analysis indicates that courts' interventions have been both sensitive to domestic circumstances and principled in upholding EU law and fundamental rights guarantees. However, they have only partially halted rights violations.

This analysis focuses on decisions on summary returns at internal borders since 2016, following the onset of the Schengen and CEAS crises.²⁰² From a total of 1,500 decisions screened, 44 relevant decisions from judicial bodies in Austria, France, Germany, Italy, and Slovenia were found. Among them, while various themes and legal instruments are discussed, all the decisions involve individuals who claim to have applied for asylum: 35 decisions fundamentally challenge policies of summary returns at internal borders.²⁰³ Of the remaining rulings, three held that

201. Fink (n 14).

202. It excludes cases processed under the Dublin system or the Return Directive and instances where access to asylum procedures was obstructed without resulting in removal or denial of entry. Additionally, rulings only related to the legality of the reintroduction of border controls are not examined.

203. *Landesverwaltungsgericht Steiermark*, 20.3-873/2016-21 and 21.3-874/2016-20; 20.3-912/2016-16; 20.3-915/2016-26; 20.3-918/2016-15 and 21.3-919/2016-15; 9 September 2016; 20.3-2725/2020-86, 1 July 2021; 20.3-2726/2020-50, 5 July 2021; 20.3-2621/2021-49, 16 February 2022; *Verwaltungsgerichtshof*, Ra 2021/21/0274-6, 5 May 2022; Ra 2022/21/0074-6, 19 May 2022; Ra 2017/21/0018, 14 November 2017. *Tribunal administratif de Nice*, 1701211, 31 March 2017; 2000856, 2000858, 24 February 2020; 2000570, 2000571 2000572, 7 February 2020; 1800714 and others, 23 February 2018; 1801843, 2 May 2018; 1800195, 22 January 2018; *Tribunal administratif de Marseille*, 1901068, 18 March 2019; *Conseil d'État*, 428178, 27 November 2020; 450285, 2 February 2024; 440756, 8 July 2020; *Conseil d'État*, Juge des référés, 411575, 5 July 2017; *Verwaltungsgericht München*,

individuals had not applied for asylum,²⁰⁴ one related to an individual who had already received a negative asylum decision,²⁰⁵ one rejected interim relief because it would anticipate the result of the main proceedings,²⁰⁶ one concerned a reference for a preliminary ruling,²⁰⁷ one established the applicability of the Schengen Borders Code in the context of detention facilities,²⁰⁸ and two overturned or annulled the court of first instance on grounds of evidence or procedural considerations.²⁰⁹

Specific courts have been crucial in all jurisdictions. The pivotal bodies in Austria, France, and Germany are the first-instance administrative courts overseeing police action in critical border areas, namely Styria,²¹⁰ the Alpes-Maritimes department,²¹¹ and Upper Bavaria.²¹² In contrast, the jurisdiction of the most relevant Italian court, the Ordinary Court of Rome,²¹³ results from its responsibility for extraterritorial legal actions. In Slovenia, the key actor is a first-instance administrative court adjudicating asylum and immigration issues originating throughout the country.²¹⁴ Finally, supreme administrative or constitutional courts have been relevant in France, Slovenia, and Austria.

Courts across jurisdictions have challenged the executive for blindly trusting that other Member States would treat individuals according to international legal standards. Based on the Court of Justice's interpretation, they have demonstrated agreement that mutual trust cannot relieve States of

M 18 E 19.32238, 8 August 2019; M 22 E 21.30294, 4 May 2021; M 11 S 19.50722, M 11 S 19.50759, 17 July 2019; *Verwaltungsgericht Berlin*, VG 6 L 191/25, 2 June 2025; *Tribunale Ordinario di Roma*, 56420/2020, 18 January 2021; 3938/2022, 9 May 2023; 21667/2023, 7 July 2023; *Upravno sodišče Republike Slovenije*, I U 1490/2019, 22 June 2020; I U 1686/2020, 7 December 2020; I U 1834/2019, 26 July 2023; *Ustavno sodišče Republike Slovenije*, U-I-59/17, 18 September 2019; U-I-52/22, U-I-202/23, 2 April 2025; *Vrhovno sodišče Republike Slovenije*, I U 1686/2020, 9 April 2021.

204. *Landesverwaltungsgericht Steiermark*, 20.3-864/2016-26 and 21.3-865/2016-23; 20.3-913/2016-18 and 21.3-914/2016-18; 29 August 2016; 20.32-814/2016-42 and 21.32-815/2016-42, 28 November 2016.

205. *Verwaltungsgericht München*, M 25 S 19.383, 28 February 2019.

206. *Verwaltungsgericht München*, M 5 E 19.50027, 9 May 2019.

207. *Conseil d'État*, 450285 and others, 28 February 2022, request for a preliminary ruling, Case C-143/22.

208. *Conseil d'État*, 450879, 23 April 2021.

209. *Tribunale Ordinario di Roma*, 7045/2021, 27 April 2021; *Vrhovno sodišče Republike Slovenije*, I Up 128/2020, 28 October 2020.

210. *Landesverwaltungsgericht Steiermark*.

211. *Tribunal administratif de Nice*.

212. *Verwaltungsgericht München*. Note that the competence of the *Verwaltungsgericht Berlin* in the case of VG 6 L 191/25, 2 June 2025, resulted from the fact that the Federal Police implemented removal operations.

213. Personal Rights and Immigration Section of Civil Department.

214. *Vrhovno sodišče Republike Slovenije*.

their responsibility to assess return risks, particularly regarding the concern of chain *refoulement*. The Munich Administrative Court, for example, has engaged deeply with the concept of mutual trust regarding summary returns to Greece. In 2019, it concluded that persistent concerns warrant a more cautious approach despite the European Commission's recommendation for gradually resuming transfers. Moreover, circumventing the Dublin safeguards could facilitate a result contrary to the aims of CEAS, namely that an individual is returned to the country of origin without a substantive assessment of the asylum claim.²¹⁵ In another case, it noted that chain *refoulement* to Turkey would violate safe third country standards.²¹⁶ Similarly, the Slovenian Administrative Court, in the context of informal pushbacks to Croatia and the concern of chain *refoulement* to Bosnia and Herzegovina, has prioritized independent *refoulement* risk assessments over mutual trust, thereby criticizing authorities for dismissing credible reports from reputable sources and testimonies of Croatian human rights abuses.²¹⁷

Courts have regularly challenged practices involving bilateral readmission agreements and mechanisms, clarifying that these cannot justify summary returns. Referring to Court of Justice case law,²¹⁸ they have noted that such arrangements cannot be isolated from EU law and the fundamental rights it protects. The Munich Administrative Court, for example, has critiqued the administrative agreement with Greece for violating Dublin procedures, emphasizing the primacy of EU law. *Inter alia*, the deal lacks sufficient safeguards with regard to the right to information, an interview, and legal remedies, and fails to assess human rights risks in Greece, the court noted.²¹⁹ The Ordinary Court of Rome has viewed the unratified bilateral agreements with Slovenia and Greece as unconstitutional and noted that readmissions lack due process and individualized assessments, risk chain *refoulement*, and violate the right to seek asylum by preventing formal claims.²²⁰ The Slovenian Administrative Court has established that

215. *Verwaltungsgericht München*, M 18 E 19.32238, 8 August 2019. See also Bellinda Bartolucci, '„Vielzahl an Kritikpunkten“ an Einreiseverweigerung nach „Seehofer-Deal“', *Zum Beschluss des VG München vom 8. August 2019* (2019) *Asylmagazin* 334.

216. As regards the concern of chain *refoulement* to Turkey, see also *Verwaltungsgericht München*, M 11 S 19.50722 and M 11 S 19.50759, 17 July 2019.

217. *Upravno sodišče Republike Slovenije*, I U 1490/2019-92, 22 June 2020.

218. eg the Slovenian Administrative Court, in its first judgment assessing summary returns (I U 1412/2019, 18 December 2019), relied on an interpretation of 18 judgments of the Court of Justice.

219. *Verwaltungsgericht München*, M 18 E 19.32238, 8 August 2019; M 22 E 21.30294, 4 May 2021.

220. *Tribunale Ordinario di Roma*, 56420/2020, 18 January 2021; 7045/2021, 27 April 2021; 3938/2022, 9 May 2023. See also Martina Sardo, 'Respingimenti a catena e tutela cautelare del diritto d'asilo. Le ordinanze del Tribunale di Roma sulle 'riammissioni

the Charter remains applicable despite using a readmission agreement, because the State acts within the scope of derogation from the Return Directive.²²¹ Beyond problematizing bilateral arrangements, however, the content of agreements has also been used to argue against the legality of practices, for example when interpreted in light of other obligations towards refugees deriving from constitutional law.²²²

Domestic law has often been a central theme in the case law. Its particular role, however, has varied according to national context. As demonstrated above, national provisions can both facilitate and restrict summary returns of asylum seekers. Thus, decisions have frequently also hinged on courts' interpretation of how domestic law interacts with EU secondary law and international human rights law. In Austria, where the current legal framework establishes the illegality of returning asylum seekers before the conclusion of the asylum procedures, the courts have faced no obstacles in finding the illegality of pushbacks once the claim of asylum has been established.²²³ Similarly, in Italy, national law has served as a resource for courts in challenging State practice.²²⁴ In Germany, however, where provisions such as the fiction of non-entry partly support circumventing EU law, the court first had to clarify the latter's primacy.²²⁵ In France, courts have contributed to establishing the correct domestic legal regime to respond to asylum claims at land borders. Back in 2017, and as later confirmed by the Court of Justice, the *Conseil d'État* ruled that asylum procedures at the border must follow territorial asylum provisions.²²⁶ In the Slovenian case law, the domestic prohibition to expel asylum seekers has been significant.²²⁷ But the Administrative Court also relied extensively on interpreting relevant EU law, international human rights law, and constitutional law to challenge the country's informal readmission practice, which eventually resulted in the upholding of the Administrative Court's decision by the Slovenian Supreme Court.²²⁸

informali' in Slovenia' (2021) 15(3) *Diritti umani e diritto internazionale* 723 <iris.unipa.it/handle/10447/553146>.

221. *Upravno sodišče Republike Slovenije*, I U 1686/2019, 7 December 2020.

222. See eg *Tribunale Ordinario di Roma*, 56420/2020, 18 January 2021 and *Upravno sodišče Republike Slovenije*, I U 1686/2019, 7 December 2020.

223. Art 12 of the Austrian Asylum Act.

224. *Tribunale Ordinario di Roma*, 56420/2020, 18 January 2021; 3938/2022, 9 May 2023; 21667/2023, 7 July 2023.

225. eg *Verwaltungsgericht München*, M 22 E 21.30294, 4 May 2021; *Verwaltungsgericht Berlin*, VG 6 L 191/25, 2 June 2025.

226. *Conseil d'État*, Juge des référés, 411575, 5 July 2017.

227. eg *Upravno sodišče Republike Slovenije*, I U 1834/2019, 26 July 2023.

228. *Upravno sodišče Republike Slovenije*, I U 1686/2020-126, 7 December 2020 and *Vrhovno sodišče Republike Slovenije*, I Up 23/2021, 9 April 2021.

Constitutionally protected rights have been a complementary safeguard invoked in domestic case law. In Italy, the national constitutional framework has been used to establish, *inter alia*, that bilateral agreements derogating from national law require parliamentary ratification, and that the constitutionally protected right to asylum includes a right to enter.²²⁹ German courts have found that the protection of family and marriage in the Basic Law does not directly require the Government to allow entry to the applicant who had previously received a negative asylum decision.²³⁰ The Basic Law's right to an effective legal protection, however, is cited by the court to justify a preliminary injunction that anticipates the final decision of the case.²³¹ In France, a principle of constitutional value, namely the freedom to help others for a humanitarian purpose, was relevant for deciding on the access of non-governmental organizations (NGOs) to the border zones.²³² The role of the Slovene constitution, including the prohibition of torture and the right to appeal, was prominent in both individual pushback cases as well as in the Constitutional Court's decisions to disallow attempts of the Government to establish emergency regulations that limit access to asylum.²³³

Overall, courts across the countries have conveyed clarity regarding Member States' obligation to provide effective access to asylum or Dublin procedures. Thus, issues of legal standing, evidence, and factual assessments – particularly concerning the asylum claim – become crucial for establishing accountability, corresponding with the prevalence of State justifications based on factual grounds assessed above. In the context of chain readmissions of individuals from Italy, Slovenia, and Austria to Bosnia and Herzegovina,²³⁴ the role of civil society organizations and their cross-country cooperation, including with journalists, has been critical to establishing and maintaining contacts with the applicants – a challenge naturally exacerbated by the lack of suspensive effect provided to appeals.²³⁵ Moreover, the cooperation of these actors can enable the production of evidence and oral statements for court proceedings.²³⁶ Although administrative practices regarding

229. *Tribunale Ordinario di Roma*, 56420/2020, 18 January 2021; 3938/2022, 9 May 2023; 21667/2023, 7 July 2023.

230. *Verwaltungsgericht München*, M 25 S 19.383, 28 February 2019.

231. *Verwaltungsgericht Berlin*, VG 6 L 191/25, 2 June 2025.

232. *Conseil d'État*, 450879, 23 April 2021.

233. *Ustavno sodišče Republike Slovenije*, U-I-59/17, 18 September 2019; U-I-52/22, U-I-202/23, 2 April 2025.

234. Beyond the case law cited here see eg also Human Rights Ombudsman of the Republic of Slovenia (n 35).

235. *Upravno sodišče Republike Slovenije*, I U 1490/2019-92, 22 June 2020; *Landesverwaltungsgericht Steiermark*, 20.3-2725/2020-86, 1 July 2021; *Verwaltungsgericht München*, M 18 E 19.322388, 8 August 2019.

236. eg *Landesverwaltungsgericht Steiermark*, 20.3-2725/2020-86, 1 July 2021.

the burden of proof can vary, case law demonstrates that judges have favoured asylum seekers' accounts over those presented by authorities when certain factors were present, thereby also relying on the case law of the Court of Justice.²³⁷ One such factor is the existence of inconsistencies and insufficient documentation in official accounts. Specifically, courts have identified discrepancies between the testimonies of different officials or a lack of vital information in official records, leading them to doubt the reliability of the authorities' version of events.²³⁸ Documented patterns of abuse and procedural irregularities reported by international organizations, NGOs, and journalistic investigations that contradict official claims and provide courts with a broader context to rely on have further amplified judicial scepticism.²³⁹

Courts have also expressed concern about the lack of due process and oversight in informal readmissions, where the absence of written decisions and legal representation raises doubts.²⁴⁰ The internal and external consistency of asylum seekers' testimonies has naturally been relevant, and courts in that context have stressed the relevance of Court of Justice's case law on standards for assessing credibility.²⁴¹ Finally, judges' long-standing experience in dealing with cases involving border police operations and the specific administrative procedures applied has been crucial.²⁴²

Beyond interpreting obligations towards asylum seekers, domestic case law has also discussed the applicability of the common return procedure. Engagement with the interpretation of the interaction of the Return Directive with the Schengen Borders Code has been particularly prominent in French case law in connection with the Court of Justice's interventions. In 2020, the *Conseil d'État* issued two landmark rulings,²⁴³ concluding that refusal of entry practices violated the Return Directive, thus aligning with the Court of Justice's case law.²⁴⁴ However, in a 2021 decision focused on detention practices, the *Conseil d'État* assumed the legality of entry refusals for individuals apprehended before formally entering French territory,²⁴⁵ thereby creating ambiguity in the legal regime. This tension persisted until 2024, when, following the Court of Justice's judgment in *ADDE and*

237. eg *Upravno sodišče Republike Slovenije*, I U 1834/2019, 26 July 2023.

238. eg *Landesverwaltungsgericht Steiermark*, 20.3-2621/2021-49, 16 February 2022.

239. eg *Conseil d'État*, 450879, 23 April 2021.

240. eg *Tribunale Ordinario di Roma*, 56420/2020, 18 January 2021.

241. eg *Upravno sodišče Republike Slovenije*, I U 1834/2019, 26 July 2023.

242. *Landesverwaltungsgericht Steiermark*, 20.3-2725/2020-86, 1 July 2021; *Upravno sodišče Republike Slovenije*, I U 1490/2019-92, 22 June 2020.

243. *Conseil d'État*, 440756, 8 July 2020; 428178, 27 November 2020.

244. Case C-143/22, *ADDE and Others*.

245. *Conseil d'État*, 450879, 23 April 2021.

Others, the *Conseil d'État* narrowed the general framework permitting blanket entry refusals at internal borders.²⁴⁶ The Slovenian Administrative Court has discussed derogations from the Return Directive in the context of informal readmissions based on the bilateral agreement with Croatia, emphasizing the general primacy of the Directive in cases involving illegal stay. Although Article 6(3) of the Return Directive would allow exceptions, the Court held that transfers must comply with the Charter, including the prohibition of *non-refoulement* and collective expulsions.²⁴⁷

Domestic courts have thus assumed a significant role in ensuring accountability for summary returns at internal borders. Manoeuvring enabling factors and obstacles, including a complex and multi-layered legal framework, they have prioritized individualized assessments over 'blind' reliance on general standards in other Member States, highlighted the limitations of bilateral arrangements, and leveraged domestic law where possible. Despite very few cases in which the Court of Justice's direct involvement was required, courts have autonomously clarified the primacy of relevant common procedures and fundamental rights in cases of derogations or conflict with domestic approaches and rules based on a consistent interpretation of national law with EU law. Finally, and typically in collaboration with civil society actors, they have safeguarded effective access to justice and established relevant facts.²⁴⁸

However, it is necessary to acknowledge that judicial interventions have had varied impacts in halting or adequately reforming unlawful practices at internal EU borders. In Austria, pushbacks towards Slovenia have been stopped, the Ministry of Interior has issued a decree outlining *non-refoulement* obligations, and mandatory police training on handling asylum applications at the border has been implemented.²⁴⁹ In contrast, respective pushback practices in France appear largely unaffected. Despite legislative amendments aimed at compliance with the Court of Justice's interpretations, entry refusals have been replaced by expedited readmission procedures drawing on bilateral arrangements and lacking crucial legal safeguards.²⁵⁰

246. *Conseil d'État*, 450285, 2 February 2024.

247. *Upravno sodišče Republike Slovenije*, I U 1490/2019, 22 June 2020; I U 1686/2020, 7 December 2020; the court relied on the *Affum* judgment of the Court of Justice, and the Charter played a key role in the assessment of the authorities' practices.

248. An in-depth analysis will be published as Alice Lacchei and Adel-Naim Reyhani, 'From Borders to Courts: The Role of Intermediaries in Challenging Austrian and Italian Pushbacks' (in preparation).

249. AIDA, 'Country Report Austria' (2025) <asylumineurope.org/reports/country/austria>.

250. See eg Committee Against Torture, 'Concluding Observations on the Eighth Periodic Report of France' (30 April 2025) UN Doc CAT/C/FRA/CO/8; Defender of Rights (n 28); AIDA, 'Country Report France' (n 140).

In Italy, pushbacks towards Slovenia seem to occur in isolated instances, while the country's border regime is increasingly supported by technological surveillance.²⁵¹ The German Government intends to continue its recently introduced pushback practice despite a court's intervention,²⁵² while rapid returns to Greece circumventing Dublin rules seem halted after court interventions. In Slovenia, the reduction in summary returns appears primarily grounded in Croatia's refusal to cooperate.²⁵³ Finally, it is noteworthy that courts are increasingly criticized or pressured for challenging States' border practices.²⁵⁴

5. Conclusions

This analysis of Member States' practices at the EU's internal borders reveals a pattern of evading common procedures provided in secondary EU asylum and immigration law. Key Member States have conducted summary returns to prevent secondary movements based on various means, including ignoring asylum claims, administrative transfer arrangements, refusals of entry, and readmission agreements. Notwithstanding the increasing inclusion of provisions for derogation in EU law, they have insisted on uni- and bilateral approaches, resulting in procedural irregularities and fundamental rights violations. While the Court of Justice has significantly contributed to legal clarity, an extensive part of the burden of closing the accountability gap has fallen on domestic courts. Their interventions have been principled in challenging State practices. Where possible, they have drawn on domestic law, including constitutionally protected rights, or, where necessary, established the primacy of EU law. However, compliance remains inconsistent across Member States, indicating a challenge to the rule of law.

The fundamental rights risks posed by rejecting individuals at internal EU borders are considered less severe than those associated with external pushbacks, particularly where the receiving Member State is known to

251. According to an interview with a representative of ASGI. See also AIDA, 'Country Report Italy' (n 33); Ministero dell' Interno (n 149).

252. Maximilian Pichl, 'Zurückweisungen vor Gericht' (*Verfassungsblog*, 3 June 2025) <verfassungsblog.de/zuruckweisungen-gericht-migration-asyl/>.

253. COM(2024)173 final (n 27).

254. Elena Giordano, 'Giorgia Meloni's Vendetta against Italy's Judges' (*Politico*, 13 November 2024) <www.politico.eu/article/giorgia-melonis-italy-judges-viktor-orban-hungary-albania-rome-court-russia-war-ukraine/>; Christian Jakob, 'Es war einmal ein Rechtsstaat' (*jungleworld*, 12 June 2025) <jungle.world/artikel/2025/24/bundesregierung-asylpolitik-gerichtsurteile-es-war-einmal-ein-rechtsstaat>.

maintain legal standards in line with European fundamental rights. The principle of mutual trust is an expression of this perspective. Our analysis indicates, however, that the reality of intra-EU summary returns, including the risks of chain *refoulement* to non-EU countries, demands thorough scrutiny.

The EU lawmaker has recently taken an ambiguous role in this context. The reform of the EU's asylum rules is intended to prevent secondary movements and, for that purpose, partly reduces and partly strengthens procedural standards. However, the fundamental principles governing access to asylum procedures and the requirement to operate transfers under common rules will remain intact. In the Schengen framework, removal practices have been formalized through the new transfer procedure, raising concerns about procedural integrity and fundamental rights protection. Nevertheless, crucial safeguards remain in place, thus rendering it a preferable alternative to the current practice based on readmission arrangements. Yet, the lack of a suspensive effect is problematic, and its non-implementation indicates Member States' preference for informal approaches. The ongoing tension between migration control efforts and legal safeguards amid perceived security threats will thus likely continue to shape dynamics at internal borders.

More broadly, the interplay between Member State practices, judicial interventions, and the evolution of EU law described in this analysis follows a worrisome trend. In short, courts have challenged Member States' increasing deviations from established procedures, thus reaffirming the primacy of fundamental rights and EU law. However, rather than fully aligning with the direction of their interpretations, recent EU legislative developments also reflect political pressures to legitimize national approaches. In this context, it is worth noting the European Commission's 2025 proposal for a Return Regulation, which leaves Article 6(3) of the Return Directive unchanged and seeks to expand the use of readmission agreements as derogations from the obligation of direct return, yet without codifying the Court of Justice's case law. Thus far, legal reforms have not overturned basic legal protections, such as the principle of *non-refoulement*. However, they indicate a strategic shift towards expediency and informality for curbing secondary movements justified by the aim of avoiding the prolonged reintroduction of internal border controls.

In this environment, strengthening domestic courts is crucial, as their engagement has neither fragmented EU law nor undermined uniform fundamental rights protections. Enhanced cooperation between courts and civil society actors has been instrumental in overcoming evidentiary and procedural barriers, warranting further support. Simultaneously, a more assertive role for

the Court of Justice is necessary. This article's findings suggest that its oversight, clarifying the law, has reinforced domestic courts' ability to uphold EU legal standards. However, the rising pressure on courts to dilute protections under the guise of security concerns should not be underestimated.²⁵⁵ Moreover, the Commission's evaluation of the Schengen *acquis* and its supervising role under the infringement procedure remain key, particularly when relevant Court of Justice or domestic case law is not respected.

However, as these processes are unlikely to effectively counteract the increasing incorporation of provisions for derogation into EU law, targeted legislative intervention is similarly imperative. Recent discussions have endorsed readmission agreements to solve the persistent reintroduction of internal border controls. This reasoning, however, is flawed. As this paper and the case law it analyses confirm, allowing bilateral arrangements without adequately preventing their excessive use exemplifies how a pragmatic approach to EU law can erode its objectives of the *effet utile* of EU law, legal coherence, and fundamental rights accountability.

The current recasting of the EU's laws on return thus presents an opportunity to reverse the trend and restore procedural integrity. This can best be achieved by completely eradicating the exemption provided by Article 6(3). Alternatively, the lawmaker could choose to codify the following principles derived from the case law of the Court of Justice: (1) Member States remain obliged to issue return decisions and apply the common return procedure post-readmission; (2) chain readmissions across multiple Member States are not permissible; (3) transfers under bilateral agreements constitute an implementation of EU law, thereby triggering the applicability of the Charter of Fundamental Rights for both Member States involved in the transfer procedure; (4) detention in the context of expedited readmission procedures is incompatible with the principle of procedural expediency; and, finally (5) readmission agreements may not be used to circumvent the objectives or guarantees of the Return Directive.

255. See n 253 as well as Madalina Moraru and Raluca Bercea, 'The First Episode in the Romanian Rule of Law Saga: Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asociația 'Forumul Judecătorilor din România, and their follow-up at the national level' (2022) 18(1) EuConst 82; Maksym Vishchyk and Jeremy Pizzi, 'Governments' Démarche against the ECtHR: Room for Discussion or Threats to Judicial Integrity' (*EJIL:Talk!*, 16 June 2025) <www.ejiltalk.org/governments-demarche-against-the-ecthr-room-for-discussion-or-threats-to-judicial-integrity/>.

